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**IN THE
SUPREME COURT
OF THE
UNITED STATES**

OCTOBER TERM, 1993

**PUD NO. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,
Petitioners,**

v.

**STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES,
AND DEPARTMENT OF WILDLIFE,
Respondents.**

**On Writ of Certiorari to the
Supreme Court of the State of Washington**

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Section 401 of the Clean Water Act authorizes states to impose conditions in water quality certificates as necessary to ensure that discharges from federally licensed activities comply with state water quality standards and with "any other appropriate requirement of state law." 33 U.S.C. § 1341. The question presented is:

Whether § 401 authorizes the State of Washington to impose minimum instream flow requirements on an applicant for a license from the Federal Energy Regulatory Commission to conduct and operate a hydroelectric project, when discharges resulting from that project would, by reducing a river's flow, injure existing uses (in this case use by salmon and steelhead) in violation of the State's water quality standards.

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STATEMENT OF THE CASE

On June 11, 1986, the Washington State Department of Ecology (Ecology) issued a water quality certificate to Petitioners, the City of Tacoma and PUD No. 1 of Jefferson County, for the proposed Elkhorn Hydroelectric Project. The certificate was issued pursuant to § 401 of the Clean Water Act (CWA).¹ The § 401 certificate contained a condition requiring Petitioners to maintain a certain minimum instream flow to protect rapidly diminishing runs of salmon and steelhead in the Dosewallips River. The minimum flow condition allows Petitioners to utilize the majority of the river's water for hydroelectric development, but requires that adequate water be released at the proposed dam to preserve salmon and steelhead in the affected portion of the river. Petitioners challenge the validity of the State's § 401 certification, which the Washington State Supreme Court upheld.

I. THE DOSEWALLIPS RIVER

The Dosewallips River originates in the glaciers of the eastern Olympic Mountains and flows east to Hood Canal in western Puget Sound. The river is pristine and undeveloped, with its upper half located in Olympic National Park. The proposed Elkhorn diversion dam will be located immediately adjacent to the park boundary.

Salmon and Steelhead trout (steelhead) currently inhabit the Dosewallips River. (Pet. App. 48a-49a.) The upper portion of the river, where the Elkhorn project is to be located, supports Chinook and Coho salmon and steelhead. These fish spend varying amounts of time in the river after hatching from their

¹ 33 U.S.C. § 1341 (1988).

eggs and then migrate down river to the Puget Sound and then to the Pacific Ocean. Several years later they return as adults, migrate upriver, and spawn, thereby continuing the species.² These fish were once numerous in the Dosewallips River, but are now declining at an alarming rate. The spring and fall Chinook runs are considered by the American Fisheries Society to be at a high risk of extinction.³ The winter steelhead run is listed as "depressed" by state and tribal fishery agencies.⁴

The State regulates water quality of the Dosewallips River under Wash. Rev. Code (RCW) ch. 90.48 (1992), which is Washington's primary water quality statute. The chapter authorizes Ecology to promulgate regulations, including "standards of quality for waters of the state,"⁵ and to implement state authority under the CWA,⁶ including the establishment of water quality standards. RCW 90.48.260(1)(b).

Washington's water quality standards classify all of the State's waters in categories ranging from Class AA (extraordinary) to Class C (fair).⁷ For each class a range of

² See generally Transcript (TR) Day Two, 74-90 (describing life cycle of Chinook and Coho salmon) and TR Day Two, 160-61 (describing life cycle of steelhead).

³ Willa Nehlsen *et al.*, *Pacific Salmon at the Crossroads: Stocks at Risk From California, Oregon, Idaho, and Washington*, 16 Fisheries Vol. 2 at 10 (March-April, 1991).

⁴ Washington Department of Fisheries *et al.*, 1992 *Washington State Salmon and Steelhead Stock Inventory* 122 (March, 1993).

⁵ RCW 90.48.035 (1992).

⁶ 33 U.S.C. §§ 1251-1387 (1988).

⁷ The water quality standards applicable to the Elkhorn project are included as Appendix A. The version of the water quality standards attached to our Brief in Opposition to Petition for Writ of Certiorari, (App. L, pp. 94a-127a) was not in effect on June 11, 1986, and therefore was not applicable to the Elkhorn project. We regret the error.

"characteristic" uses is defined. Wash. Admin. Code (WAC) 173-201-045 and -080 (1992). The standards then set numeric and narrative water quality criteria for each classification of water body. Finally, the standards contain a number of general requirements, including an antidegradation policy. WAC 173-201-035 (1992).

Washington's water quality standards classify the Dosewallips River as Class AA (extraordinary). WAC 173-201-080(32). The characteristic uses of Class AA waters include salmonid and other fish "migration, rearing, [and] spawning." WAC 173-201-045(1)(b). The State's antidegradation policy is set forth at WAC 173-201-035(8). It reads, in part, as follows:

The antidegradation policy of the state of Washington, as generally guided by chapter 90.48 RCW, Water Pollution Control Act, and chapter 90.54 RCW, Water Resources Act of 1971, is stated as follows:

(a) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

* * * * *

(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term and irreparable harm to the environment.

II. THE PROPOSED ELKHORN HYDROELECTRIC PROJECT

The proposed Elkhorn Hydroelectric Project will consist of a diversion dam, which will divert most of the water in the Dosewallips River into a large tunnel. This tunnel, also called a penstock, will parallel the river for 1.2 miles and then direct the diverted river water into a powerhouse. There, the water

will pass through turbines, generating electricity. The water will then be discharged back into the river channel through the tailrace. The 1.2-mile river segment between the dam and the tailrace is referred to as the bypass reach.

The diversion dam will be ten feet high and fifty feet across and will completely block the flow of the river.⁸ The dam will not create a reservoir, but will increase the river's surface area behind the dam by approximately .5 acres.⁹ At the dam, the majority of river water will be diverted into the penstock. However, some river water will be passed through the dam by sluice gate or through a fish ladder into the river channel below.

Excluding the driest months of the year when the Elkhorn project usually will not operate, the project as proposed by Petitioners will reduce the flow in the river, on average, by approximately 75%.¹⁰ This reduction in flow will reduce habitat available to salmon and steelhead for rearing, migration, and spawning. The court below ruled that the project, with the minimum flows proposed by Petitioners, will reduce available habitat to such an extent that continued use of the bypass reach by salmon and steelhead will be adversely affected or eliminated. (Pet. App. 8a.) This factual finding is not challenged by Petitioners.

⁸ Pollution Control Hearings Board (PCHB) Ex. A-4, pp. E2-11.

⁹ PCHB Ex. A-4, pp. E2-11. The dam "will influence * * * the surface profile of the river for a distance of about 300 feet upstream."

¹⁰ PCHB Ex. R-3. The minimum instream flow required by the State will result in an average flow reduction of 60%.

III. PROCEEDINGS BELOW

Under the Federal Power Act (FPA), 16 U.S.C. § 791 *et seq.*, (1988 and 1992 Supp.), the Federal Energy Regulatory Commission (FERC) possesses the authority to license new hydroelectric projects. Under § 401 of the CWA, 33 U.S.C. § 1341, however, applicants for FERC licenses whose activities may result in a discharge into navigable waters of the United States must first obtain from the state a certification that the activity will comply with water quality requirements described in § 401. Section 401(d) of the CWA authorizes the state to impose limitations on the certification and further provides that those limitations "shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d).

Because Petitioners' proposed Elkhorn Hydroelectric Project will cause a discharge into navigable waters, Petitioners sought a § 401 certification from the State prior to obtaining a license from FERC under the FPA. To that end, Petitioners began working in 1982 with experts from Ecology, the Washington State Departments of Fisheries and Wildlife, the U.S. Fish & Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty Council (a consortium of Indian tribes that have historically fished in the Dosewallips River and Hood Canal) to identify a minimum flow that would protect salmon and steelhead in the Elkhorn project's bypass reach. Petitioners and the agencies agreed to conduct an instream flow, incremental method (IFIM) study, which all parties agreed was the "state of the art" methodology for identifying an appropriate minimum flow. (Pet. App. 49a.)

At the conclusion of the study, all parties attempted to reach agreement with regard to the necessary minimum flow. In October 1985, the agency experts identified the minimum flow that they believed to be the minimum necessary to preserve and protect the bypass reach as viable habitat for salmon and steelhead. The actual volume of the minimum flow varies by month to provide adequate protection to the species (Chinook, Coho or steelhead) and life stage (egg, smolt, adult) of such species present in the river during each month.¹¹

On June 11, 1986, Ecology issued a water quality certificate for the Elkhorn project. The certificate includes a condition requiring the minimum flow agreed to by the agency experts.¹²

Petitioners appealed the § 401 certificate to the Pollution Control Hearings Board (PCHB).¹³ On motions for summary judgment, the PCHB ruled that the minimum flow condition is

¹¹ PCHB Ex. R-3.

¹² The § 401 certificate contained a statement that the minimum flows required by Ecology "are in excess of those required to maintain water quality in the bypass region." (Pet. App. 83a.) In light of the Washington Supreme Court's ruling that the minimum instream flow required by the State is necessary to ensure compliance with state water quality standards (Pet. App. 7a), this statement is completely irrelevant. Petitioners contend nonetheless, that, by this statement, Ecology has conceded that the minimum flow is not related to water quality. As we have explained previously, an affidavit was filed by the author of this language in which he explained that the reference to the term "water quality" in the contested phrase was a reference to water temperature only. The affidavit states:

[W]hen I stated that the flows are in excess of those required to maintain water quality, I meant that the flows are more than are necessary to ensure compliance with the applicable water quality standards for temperature.

Resp. App. 88a. Thus, Ecology has not conceded that the minimum flow is not related to water quality. Ecology's only concession is that the minimum flow is not necessary to ensure the Elkhorn project's compliance with water temperature standards.

¹³ The PCHB is a quasi-judicial administrative board with jurisdiction to hear appeals from final decisions of Ecology. RCW 43.21B.110 (1992).

appropriate under § 401 and under state water quality laws. Specifically, the PCHB ruled that the minimum flow condition is necessary to ensure the Elkhorn project's compliance with RCW 90.54.030(2)(a) (1992) (requiring base flows to protect, *inter alia*, fish and wildlife) and that this state law is an "other appropriate requirement of state law" under § 401(d).¹⁴ Furthermore, the PCHB rejected Petitioners' argument that the FPA preempts the minimum flow requirement. (Pet. App. 71a.)

On December 15-18, 1988, the PCHB held a hearing in this matter. The issues at the hearing were 1) what fish species, if any, inhabit the bypass reach, and 2) whether the flow required by Ecology was "appropriate for the preservation of the fishery resource" in the Dosewallips River. (Jt. App. 16.) The PCHB held that Coho and Chinook salmon and steelhead inhabit the bypass reach. (Pet. App. 49a.) The PCHB also ruled that the minimum flow required by Ecology would enhance the Dosewallips River for fish and, therefore, was inappropriate under state law. (Pet. App. 50a-51a.)

On February 24, 1989, the State and Petitioners both appealed the PCHB's decision to Thurston County Superior Court. The superior court affirmed the PCHB's ruling that the minimum flow condition is authorized by § 401 and that the minimum flow condition is not preempted by the FPA. (Pet. App. 39a-42a.) The superior court reversed the PCHB's enhancement ruling, finding it to be clearly erroneous. (Pet. App. 34a.)

¹⁴ Pet. App. 80a. The PCHB held that any state law related to water quality is an "appropriate" requirement of state law under § 401(d), and that RCW 90.54.030(2)(a) is related to water quality. The PCHB concluded, therefore, that a condition designed to ensure the project's compliance with this state law is valid under § 401(d). Pet. App. 78a-80a.

Petitioners appealed the superior court's decision to the Washington Supreme Court. The Washington Supreme Court unanimously affirmed. The court ruled that the minimum flow is necessary to ensure the Elkhorn project's compliance with state water quality standards, and that conditions that are necessary to ensure a project's compliance with water quality standards are appropriate under § 401(d).¹⁵ (Pet. App. 7a-8a.) The court also held that the minimum flow is necessary to ensure the Elkhorn project's compliance with RCW 90.54.030(2)(a). (Pet. App. 10a-14a.) The court reasoned that this provision of state law is related to water quality and is, therefore, an "appropriate requirement of state law" under § 401(d), upon which the minimum flow condition could validly be based.

Finally, the court ruled that the minimum flow requirement is not preempted by the FPA. (Pet. App. 21a.) The court reasoned that issuance of a water quality certificate pursuant to § 401, with conditions designed to ensure compliance with water quality standards required by § 303 of the CWA¹⁶ and approved by the Environmental Protection Agency (EPA),

cannot be fairly regarded as state action for purposes of the application of federal preemption. Simply put, [the] federal preemption doctrine does not apply in a context where a state is acting to fulfill its federally mandated role in the comprehensive federal scheme embodied in the [CWA].

(Pet. App. 16a-17a.) The court also ruled that, even if the threshold requirement of state action were present, a finding of

¹⁵ In reaching this conclusion, the court noted that Petitioners conceded in their argument before the court that conditions designed to ensure compliance with water quality standards are appropriate under § 401. Pet. App. 7a.

¹⁶ 33 U.S.C. § 1313.

preemption would not be appropriate as no conflict exists between the minimum flow condition and any federal action, and given § 401, it clearly cannot be the case that the FPA has occupied the field so as to preclude a state action. (Pet. App. 17a-21a.)

SUMMARY OF ARGUMENT

The judgment of the state supreme court should be affirmed because § 401 of the CWA authorizes the State to condition its certification of the Elkhorn project on that project's complying with minimum instream flow requirements necessary to ensure compliance with the State's water quality standards. Petitioners concede that § 401 applies to the Elkhorn project because it will result in "discharge into the navigable waters" and Petitioners further concede that the State is authorized to impose conditions necessary to ensure that those discharges do not violate the State's water quality standards. The issue in this case then is whether § 401 allows the State to impose a minimum instream flow condition without which the Elkhorn project will violate state water quality standards. Petitioners claim that such a condition is outside the scope of § 401. Their contention cannot be squared with the plain meaning of the statutory language, its legislative history, or with EPA's long-standing administrative construction of § 401.

1. The State's minimum instream flow requirement falls within the plain terms of § 401(d) because it is a "limitation" necessary to ensure that the Elkhorn project complies with state water quality standards. See 33 U.S.C. § 1341(d). Petitioners are not contesting before this Court the lower court's findings that, absent the state-imposed minimum flow requirement, the Elkhorn project will interfere with or injure salmon and steelhead

migration, rearing, and spawning in violation of state water quality standards. Consequently, the validity of the State's action in this case is clear.

2. Under the CWA, and § 401 specifically, states must ensure compliance with all of their water quality standards and are not, as Petitioners argue, limited to enforcing their water quality criteria. EPA's water quality standard regulation, 40 C.F.R. pt. 131 (1992), implements § 303 of the CWA, and requires that state water quality standards consist of designated uses, water quality criteria, and an antidegradation policy. Washington's water quality standards include these three components. Washington's antidegradation policy, consistent with EPA's requirements (40 C.F.R. § 131.12), prohibits degradation of water quality that interferes with or injures existing water uses. The Elkhorn project will violate the State's antidegradation policy, which is an integral and independently enforceable part of Washington's standards, by injuring existing water uses. The State's minimum instream flow requirement is valid under § 401 because it is necessary to prevent that injury, and thereby, bring the Elkhorn project into compliance with state water quality standards.

3. Section 401 does not limit the State to ensuring compliance with water quality standards. Section 401(d) further authorizes the states to impose conditions necessary to ensure compliance within "any other appropriate requirement of state law." Because RCW 90.54.030(2)(a), which requires minimum instream flows to protect, *inter alia*, fish and wildlife, is reasonably related to the policies and purposes of the CWA, it is an "appropriate" state law requirement, within the meaning of § 401(d). The minimum instream flow requirement is valid

therefore, because it is necessary to ensure the Elkhorn project's compliance with this "appropriate requirement of state law." 33 U.S.C. § 1341(d).

4. Congress intended that states perform a broad review of all of a facility's "discharges" under § 401. Congress used "discharge" without qualification in § 401, pointedly declining to use the more narrow term "discharge of a pollutant." Thus, § 401 authorizes state review of any discharge which may cause "pollution" of the affected water body, which the Act broadly defines to include any man-induced or man-made alteration of the chemical, physical, or biological integrity of water. See 33 U.S.C. § 1362(19).

—The Elkhorn project will result in numerous discharges causing pollution, including pollution that will violate the State's water quality standards. The most fundamental of these is the dam itself, constituting as it does, a massive and permanent addition of material into the water. This discharge will cause pollution by obstructing and reducing the river's flow. The State's minimum instream flow requirement directly addresses this discharge-caused pollution. In addition, construction and operation of the Elkhorn project will cause a number of discharges of pollutants and non-point source pollution. Each of these discharges trigger § 401, which authorizes the State to ensure that each of these discharges and the pollution they cause will comply with applicable water quality requirements — most importantly, water quality standards.

5. The State's exercise of authority in this case is not preempted by the FPA. Indeed, it cannot be, because the State here, unlike California in *California v. FERC*, 495 U.S. 490 (1990), is not claiming its right as a matter of state law, but

instead as a matter of federal law under § 401. Nor, unlike in *California v. FERC*, is the State seeking unilaterally to impose its state minimum instream flow requirement in a pre-existing FERC license.

The State's authority under § 401 is more properly analogized to the Secretary of the Interior's authority under § 4(e) of the FPA (16 U.S.C. § 797(e)), which FERC unsuccessfully challenged in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). Section 4(e), like § 401, reflects congressional intent to allow decisionmakers other than FERC to "protect the resources under their respective jurisdictions" by assigning them the authority to dictate certain conditions to be included in a FERC license. 466 U.S. at 775. That congressional policy determination was controlling in *Escondido* and is equally controlling here.

ARGUMENT

I. SECTION 401 AUTHORIZES THE IMPOSITION OF CONDITIONS, INCLUDING MINIMUM INSTREAM FLOW CONDITIONS, ON A WATER QUALITY CERTIFICATE WHEN SUCH CONDITIONS ARE NECESSARY TO PREVENT VIOLATIONS OF STATE WATER QUALITY STANDARDS THAT WERE APPROVED BY EPA PURSUANT TO SECTION 303 OF THE CLEAN WATER ACT

Petitioners contend (Pet. Br. 19-21) that the outcome in this case is controlled by congressional intent in the Federal Power Act of 1920 to confer on FERC (then the Federal Power Commission) exclusive authority over the licensing of hydroelectric projects in navigable waters of the United States. Petitioners are mistaken. The outcome in this case does not turn on the meaning of the FPA. It turns on what Congress intended when it enacted the CWA over fifty years later. More

particularly, the only question before this Court concerns the meaning of § 401 of the CWA, 33 U.S.C. § 1341, which, we contend, evinces clear congressional intent to authorize states to impose conditions in § 401 certificates when necessary to prevent violations of state water quality standards. This includes the authority to require that a FERC-licensed hydroelectric project maintain a minimum instream flow where, as here, such a flow is necessary to prevent violations of state water quality standards.

The dispute between the parties regarding the meaning of § 401 is far narrower than Petitioners' rhetoric suggests. Notwithstanding Petitioners' claims (Br. 19) of "FERC's pervasive jurisdiction," Petitioners do not in fact dispute that § 401 authorizes a state to impose many kinds of water pollution controls on the proposed construction and operation of a hydroelectric facility. Nor do they dispute that FERC must include those conditions in the federal license. (Pet. Br. 31.)

There is likewise no dispute, before this Court at least, regarding the actual water quality impacts of the construction and operation of the Elkhorn project. Petitioners are not challenging the findings of fact made below regarding the significant adverse impacts on water quality that would result absent the minimum instream flow requirements imposed by the State under § 401. The court below ruled that, in the absence of the minimum instream flow required by the State, the Elkhorn project would cause harm to fish migration, rearing, and spawning. (Pet. App. 8a.) These uses are "uses" formally designated by the State, and formally approved by EPA, for the affected waters pursuant to § 303 of the CWA. See 33 U.S.C. § 1313. The court further ruled that such harm constitutes degradation of state waters in contravention of the State's antidegradation policy, which is also

part of the State's water quality standards developed, and approved by EPA, pursuant to § 303. (Pet. App. 8a.)

Rather than challenge these judicial findings, Petitioners claim that, notwithstanding § 401's applicability to the Elkhorn project, the State is powerless to address the Elkhorn project's adverse water quality impacts. Petitioners posit (Pet. Br. 20) that "the determination of streamflow quantities to protect fish habitat at hydroelectric projects is outside the scope of § 401." The courts below correctly rejected this claim. Section 401 contains no loophole for federally licensed activities that violate state water quality standards by reducing the flow of navigable waters. Water "pollution," within the meaning of the CWA, can result from flow reduction as much as it can from the addition of pollutants. Either may result in a "man-made or man-induced alteration of the chemical, physical [and] biological * * * integrity of water." 33 U.S.C. § 1362(19). Indeed, that is precisely the result of Petitioners' proposed flow reductions in this case. They will degrade water quality and result in a diminution of fish species in violation of water quality standards. Prevention of this form of pollution, and consequent violations of water quality standards through minimum instream flow requirements, is no less valid than the imposition of effluent limitations to restrict the addition of pollutants.

In support of our view, we rely on the plain meaning of § 401's statutory language, the statutory design, the relevant legislative history, and the long-standing construction of that provision by EPA, which is the federal agency responsible for its administration. All show that Congress intended in § 401 to provide states with broad authority to ensure that federally licensed activities do not violate state water quality standards.

A. Section 401's Plain Meaning Authorizes States To Ensure Compliance With State Water Quality Standards By Imposing Limitations on Flow Reductions

1. Petitioners do not dispute that a state's certification authority under § 401 extends to ensuring compliance with state water quality standards.¹⁷ Nor could they. Under the plain terms of § 401, the State's water quality standards are clearly a proper basis for denying or conditioning state certification. Section 401(a)(1) expressly states that noncompliance with § 303 water quality standards is grounds for denial of a § 401 certificate. Section 401(d), moreover, makes state water quality standards appropriate bases for conditions in § 401 certificates. These standards were developed by the State and approved by EPA¹⁸ pursuant to § 303, and therefore constitute an "applicable limitation * * * under section 301" of the Act, which incorporates by express reference the requirements of § 303. See 33 U.S.C. § 1341(d).¹⁹

¹⁷ Pet. App. 7a ("The parties agree that state water quality standards qualify as appropriate requirements of state law for purposes of section 401(d), and so may serve as the source for conditions imposed in the section 401 certificate."). (Emphasis added.) See also Pet. Br. 9 ("Water quality standards under CWA § 303 are among the provisions on which a State may base compliance conditions under § 401(d).")

¹⁸ Washington's water quality standards are patterned closely after EPA's requirements, including designated uses, water quality criteria (both numeric and narrative), and an antidegradation policy. EPA approved Washington's standards in 1974. See 42 Fed. Reg. 56,792 (1977).

¹⁹ As originally enacted, § 401(a)(1) listed §§ 301, 302, 306, and 307 as provisions of the Act with which states were required to ensure compliance. In 1977, a reference to § 303 was added to § 401(a)(1). Clean Water Act of 1977, Pub. L. No. 95-139, 91 Stat. 1566 (1977). The Conference Report explained that this change was simply a clarification and not a substantive change in the law. The report further explained that compliance with § 303 water quality standards was always required under § 401 because of its reference to § 301, which incorporates water quality standards promulgated under § 303. "Section 303 is always included by

The legislative history, moreover, reveals that maintaining compliance with state water quality standards was § 401's primary purpose. The legislative history includes numerous references to state water quality standards in discussing the scope of state authority under § 401. For example, the Conference Report accompanying the 1972 legislation states "the Conferees agreed that a State may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that State."²⁰ Indeed, Congress felt so strongly about the importance of the states' ability under § 401 to ensure compliance with state water quality standards that Congress amended § 401 in 1977 for that very purpose: to remove any possible doubt "that state water quality standards would be imposed through § 301, and thus certification by the State would include consideration of water quality standards." S. Rep. No. 370, 95th Cong., 1st Sess. 72 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4397.

EPA has construed § 401 accordingly. The agency's regulations expressly provide that states may enforce their water quality standards through § 401. *See* 40 C.F.R. § 121.2(a)(3) (1992).²¹ We do not believe that any other result is tenable, in

reference where section 301 is listed." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4471.

²⁰ Comm. on Public Works, 93d Cong., 1st Sess., *Legislative History of the Water Pollution Control Amendments of 1972*, at 176 (Comm. Print 1973).

²¹ *See* EPA, *Wetlands and 401 Certification* 23 (1989). ("In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limits, water quality standards, * * * and with 'any other appropriate requirement of State law'." (Emphasis added.)

light of the plain language of the statute and its legislative history, but even if there were statutory ambiguity, EPA's authoritative interpretation would clearly be entitled to deference. *See, e.g., Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1059 (1992); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. The propriety of limitations on flow reductions to ensure compliance with state water quality standards is no less clear under the plain terms of § 401. Section 401(d) describes in no uncertain terms the scope of conditions that may be imposed to ensure the "applicant['s]" compliance with applicable water pollution requirements. Such "conditions" are not confined to "effluent limitations," which limit the addition of pollutants to the waters, but may include "other limitations" as well. 33 U.S.C. § 1341(d). The statutory language in no manner questions the propriety of such a limitation taking the form of a limitation on flow reduction.

To be sure, § 401's plain language confines the scope of permissible "limitations," but it does so based on their purpose rather than their form. According to § 401(d), such "limitations" are confined to those

necessary to assure that any applicant * * * will comply with any applicable effluent limitations and other limitations, under section [301 or 302] of this title * * * and with any other appropriate requirement of State law set forth in such certification * * *.

33 U.S.C. § 1341(d). The minimum flow condition is a "limitation" necessary to assure the Elkhorn project's compliance with water quality standards, and is therefore within the scope of conditioning authority provided by § 401(d).

Finally, there is no merit to Petitioners' assertion (Pet. Br. 37-42) that the CWA generally bars the use of minimum instream flow requirements to promote water quality objectives. In support, Petitioners rely on §§ 101(g) and 510(2) of the Act, both of which evince congressional intent to ensure that the CWA does not serve as a basis for federal usurpation of the states' traditional authority over water rights pertaining to water quantity. See 33 U.S.C. §§ 1251(g), 1370(2).

Petitioners' claim is, to say the least, ironic. Petitioners invoke two provisions of the CWA designed to preserve state control over water rights, including the water quality impacts of the allocation of those rights, to support their claim that the State here *lacks* the power to regulate flow to protect water quality in its borders. What Petitioners ignore is that under § 401, the federal government is not attempting to use flow requirements to protect water quality. *The State is*. And, as reflected in the very provisions upon which Petitioners rely, the State's ability to do so was decidedly something that the CWA intended *not* to disturb.

Indeed, for that reason, §§ 101(g) and 510(2) actually support our view. But, in any event, the congressional determination that the federal government could not interfere with state water rights for water quality protection purposes provides absolutely no support for Petitioners' claim that Congress intended to prevent the states likewise from doing so.

3. Section 401 therefore imposes only one limitation on the use of minimum instream flow requirements under § 401. And that is the same limitation generally imposed by the section — it must be necessary to ensure compliance with applicable requirements, including water quality standards. The validity of

the State's imposition of limitations on the Elkhorn project's projected flow reductions, therefore, depends entirely on whether such limitations are necessary to ensure compliance with state water quality standards. And, about that, there can be no serious dispute in this case.

Washington's standards identify salmon and other fish migration, rearing, and spawning as characteristic uses of the Dosewallips River²² and prohibit degradation of the river "which would interfere with or become injurious to existing beneficial uses."²³ Without the minimum instream flow required by the State, the Elkhorn project will violate this requirement. As described by the court below,

[g]iven that Ecology's fisheries biologists determined that the instream flows urged by Tacoma risked such degradation, Ecology therefore could not issue the 401 certification without imposing more protective instream flow conditions.

(Pet. App. 8a.) The State's minimum instream flow condition is therefore necessary to bring the project into compliance with Washington's water quality standards, and, as such, falls squarely within the bounds of an appropriate exercise of § 401 conditioning authority.

B. The State Must Ensure Compliance With All Of Its Water Quality Standards, Not Just The Water Quality Criteria

The state water quality standard upon which the State bases its instream flow requirement is the State's antidegradation policy. This policy, as required by regulations promulgated by

²² WAC 173-201-080(32) and -045(1)(b).

²³ WAC 173-201-035(8)(a).

EPA under § 303, prevents interference with or injury to "existing uses." In this case, existing uses include use by salmon and steelhead of the Dosewallips River.

Petitioners seek to avoid this requirement of Washington's standards by inventing a distinction between different types of state water quality standards and claiming that § 401 ensures compliance with some but not others. Petitioners contend, moreover, that the state water quality standard upon which the State has based its flow reduction limitations, i.e., the antidegradation policy, falls outside § 401's scope. In particular, Petitioners argue that only the "water quality criteria" portion of Washington's water quality standards are enforceable. Washington's standards do not support this argument in any way. Washington's antidegradation standard prohibits, in no uncertain terms, degradation of state waters that interferes with or injures existing uses. This provision is every bit as enforceable as Washington's water quality criteria. Likewise, nothing in the CWA or in EPA's water quality standard regulations support Petitioners' narrow interpretation of water quality standards.

Section 303(c)(2)(a) contains what is apparently the crucial phrase of § 303 for Petitioners' argument. This phrase reads as follows:

Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.

33 U.S.C. § 1313(c)(2)(a). From this language, Petitioners argue that the criteria "provide the operative regulatory requirements and the designated uses provide water quality goals that the criteria are to protect and advance." (Pet. Br. 31-32.) This conclusion simply does not follow from the quoted

language. To the contrary, the quoted language simply states that water quality standards are to consist of designated uses *and* the water quality criteria for such waters based upon such uses.

EPA's water quality standard regulations implement § 303. 40 C.F.R. pt. 131. In 40 C.F.R. § 131.6, EPA defines the minimum requirements for state water quality standards to be submitted to EPA for review and approval. This section requires that such standards include:

(a) Use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act.

(c) Water quality criteria sufficient to protect the designated uses. [and]

(d) An antidegradation policy consistent with § 131.12.²⁴

40 C.F.R. 131.6.

Designated uses are defined at 40 C.F.R. § 131.3(f) as "those uses specified in water quality standards for each water body * * * whether or not they are being attained." Thus, designated uses may or may not actually exist in the water body. 40 C.F.R. § 131.10(a) states that designated uses are to "be achieved and protected." The water quality criteria are intended to accomplish this objective. 40 C.F.R. § 131.11(a).

Importantly, however, EPA's regulations require a higher level of protection for *existing uses*, which are defined as "those uses actually attained in the water body on or after

²⁴ Since enactment of § 401, EPA has consistently required the states to protect existing uses via an antidegradation policy. The initial water quality standard regulation promulgated after § 303 was enacted required states to adopt standards that included designated uses, water quality criteria and an antidegradation policy. 40 C.F.R. § 130.17 (1975). The antidegradation policy was initially established by the Secretary of Interior in 1968, implementing the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965).

November 28, 1975 * * * .²⁴ 40 C.F.R. § 131.3(e). Section 131.12 defines the antidegradation policy, which expressly protects existing uses. Each state is required to adopt a policy consistent with, *inter alia*, the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, * * * that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully.

40 C.F.R. § 131.12(a)(1) and (2).

Hence, EPA's construction of § 303, as formally expressed by its water quality standard regulations, does more than just support the lower court's holding. The agency's construction requires that state water quality standards contain an antidegradation policy, which, in turn, requires the maintenance of existing water uses.

EPA's formal CWA guidance to the states similarly requires protection of existing uses. In the agency's "Introduction to Water Quality Standards," EPA carefully explains that "[t]he EPA's antidegradation policy sets minimum requirements for State antidegradation policies which conserve, maintain and protect existing uses and water quality."²⁵ EPA has also stated that "no activity is allowable under the antidegradation policy which could partially or completely

²⁵ EPA, *Introduction to Water Quality Standards* 18 (1988).

eliminate any existing use whether or not that use is designated in a state's water quality standards."²⁶ Thus, in implementing the CWA, EPA has required states to adopt antidegradation policies that prohibit water degradation that would injure or eliminate existing water uses. Because EPA is responsible for implementing the CWA, the agency's judgment is entitled to substantial deference. *Arkansas*, 112 S. Ct. at 1059;²⁷ *Chevron*, 467 U.S. 837.

It is critical to recognize that Congress has ratified the antidegradation policy developed by EPA. Section 303(a)(1) provided that any state water quality standards in effect on October 18, 1972, would remain in effect unless subsequently disapproved by EPA. At that time, all fifty states had promulgated antidegradation policies protecting existing water uses. See Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water*, 62 Iowa L. Rev. 643, 659 (1977). Moreover, in 1987 Congress specifically endorsed the antidegradation policy when it enacted § 404(b)(4)(B) of the Water Quality Act of 1987, Pub. L. 100-4, 101 Stat. 7. This section amended § 303 of the CWA, providing that "any water quality standard

²⁶ EPA, *Questions and Answers re: Antidegradation* 3 (1985).

²⁷ *Arkansas v. Oklahoma* is instructive not only with regard to the propriety of deference to EPA's interpretation of the CWA, but also with regard to the enforceability of the antidegradation standard. The primary issue in that case was the appropriateness of EPA's application of Oklahoma's antidegradation standard to a single source of water pollution located in Arkansas. The Court upheld EPA's application of the standard. 112 S. Ct. at 1059-61. Implicit in this Court's holding, and in EPA's action, was the shared understanding that Oklahoma's antidegradation standard applied to an individual discharger and water quality impacts resulting from the discharge. This application of a state's antidegradation standard conflicts with Petitioners' argument that the antidegradation standard "cannot be applied under § 401 independently of the criteria * * * (Pet. Br. 36).

established under this section or any other permitting standard may be revised only if such revision is consistent with the antidegradation policy established under this section." 33 U.S.C. § 1313(d)(4)(B).²⁸

Finally, Petitioners' attempt to limit the ability of a state to safeguard its water quality standards under § 401 is not only inconsistent with the terms of the CWA and EPA's long-standing construction of the statute, it is wholly incompatible with the statute's purpose. The simple fact is that water quality criteria oftentimes do not adequately address the water quality impacts of certain activities. The Elkhorn project is a perfect example. The project, as proposed by Petitioners, will injure or eliminate an existing use of the Dosewallips River. Yet, the project will likely not violate any of Washington's water quality criteria. The antidegradation policy is intended to prevent exactly this eventuality. The antidegradation policy is a water quality insurance policy, to be used in situations like this one, where the criteria alone will not adequately protect existing water uses.²⁹ Just like the water quality criteria, the antidegradation policy is an essential component of state water quality standards, which must be enforced through § 401.

²⁸ The Senate Report describes the antidegradation policy as "the cornerstone of the entire Clean Water Act." Senate Comm. on Environment and Public Works, 100th Cong., 2d Sess., Legislative History of the Water Quality Act of 1987 (Public Law 100-4) including Public Law 97-440; Public Law 97-117; Public Law 96-483; and Public Law 96-148, at 1422, 1426 (Comm. Print 1988).

²⁹ Petitioners' criteria argument puts form over substance. If states, as they are free to do, promulgate instream flow or aquatic resource standards as part of their water quality criteria, hydroelectric projects would be required to comply with those criteria, even under Petitioners' restrictive analysis of water quality standards. Is it permissible to regulate hydroelectric projects under instream flow or other narrative criteria and impermissible to do so under the antidegradation standard? Such a result is absurd.

In summary, Washington's water quality standards require, in clear and unambiguous terms, that existing uses be maintained. The minimum flow required by the State is necessary to maintain an existing use, and without it the Elkhorn project will violate Washington's standards. Furthermore, Washington's water quality standards and their requirement that existing uses be maintained are wholly consistent with § 303 of the CWA and EPA's implementing regulations.

II. SECTION 401 AUTHORIZES THE IMPOSITION OF CONDITIONS ON A WATER QUALITY CERTIFICATE WHEN NECESSARY FOR COMPLIANCE WITH "OTHER APPROPRIATE REQUIREMENTS OF STATE LAW"

The State's minimum flow requirement is a permissible limitation under § 401 even if, contrary to our argument above, compliance with § 303 requires only compliance with the State's water quality criteria. Section 401(d), which defines the substantive scope of § 401 certification conditions, authorizes states to impose not only conditions that are necessary to ensure compliance with water quality standards, but also those necessary to ensure compliance with "any other appropriate requirement of state law." Petitioners argue that this phrase refers only to water quality standards developed by the states pursuant to § 303 of the CWA. We contend, and the court below agreed (Pet. App. 13a), that the phrase is not limited to state water quality standards, but includes any state law requirement — statute or regulation — which is reasonably related to the water quality goals of the CWA.

Section 401(d)'s literal terms, once again, provide no support for Petitioners' claimed distinction. Quite the opposite is true. Their plain import is that the term "appropriate

requirement" is not confined to those state water quality standards already within the Act's formal embrace. Section 401(d) thus pointedly distinguishes between those requirements arising under federal law and those arising under state law. It provides, first, for limitations necessary to ensure the applicant's compliance with §§ 301, 302, 306, and 307 of the CWA, and then goes on to extend the scope of compliance to "any other appropriate requirements of state law."

To be sure, this final clause does not sanction the State's imposing any kind of state law requirement on an applicant for a federal license or permit. The requirement must be "appropriate." But, contrary to Petitioners' submission (Pet. Br. 45), "appropriate" does not confine the state law to a § 303 water quality standard. Otherwise, the clause would add nothing, because, as Petitioners elsewhere concede (Pet. Br. 44), those § 303 water quality standards are already within the scope of § 401(d) by virtue of its reference to § 301 which explicitly incorporates § 303.³⁰ It is axiomatic that congressional enactments are to be interpreted such that every word, clause and sentence of a statute is given effect. *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992); *United States v. Gooding*, 25 U.S. 460 (1827). The natural and ordinary meaning of § 401(d), therefore, is that the State can impose limitations

³⁰ See note 19, *supra*. "Section 303 is always included by reference where section 301 is listed." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), reprinted in 1977 U.S.C.C.A.N. 4424, 4471.

necessary for compliance with § 303 state water quality standards and with "any other appropriate requirements of state law."³¹

In our view, "appropriate" simply means that the requirement must, of course, relate to the activity in question and, even more fundamentally, be "reasonably related" to the purposes and policies of the CWA. *Cf. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984) (condition imposed by Secretary of the Interior on FERC license for hydropower project within Indian reservation "must be reasonably related to the protection of the reservation and its people").³² EPA has embraced a similar view, concluding that Congress meant in § 401(d)'s reference to appropriate requirements to allow "[s]tates to condition certifications on compliance with any State or local law requirements related to water quality preservation." EPA, *Wetlands and 401 Certification* 25-26 (1989).

Applying this analysis here, it is readily apparent that RCW 90.54.030(2)(a) requiring minimum instream flows to

³¹ Petitioners' reference to the canon of statutory construction "*ejusdem generis*" to support a different result is unavailing. Here, Congress has deliberately set "any other appropriate requirement of State law" apart from "any applicable effluent limitations and other limitations" in order to ensure the provision's expansive construction. Hence, application of *ejusdem generis* is not warranted because "it may not be used to defeat the obvious purpose of legislation." *Gooch v. United States*, 297 U.S. 124, 128 (1936); see *King v. United States*, 379 U.S. 329, 336-37 (1964) ("other person"); *United States v. Alpers*, 338 U.S. 680, 683-84 (1950) ("other matter of indecent character"); see also *Cutler v. Kouns*, 110 U.S. 720, 728 (1884) ("other crimes").

³² The Washington Supreme Court below sought guidance from § 101(a) of the CWA, which describes the Act's purpose, in interpreting the "other appropriate requirements" phrase. See 33 U.S.C. § 1251(a). Upon the Act's objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, the state supreme court reasoned "[t]his broad purpose suggests that what state laws qualify as 'appropriate' for purposes of section 401(d) should also be understood broadly." (Pet. App. 11a.)

preserve, *inter alia*, fish and wildlife, is just such an "appropriate" state law under § 401(d). This state statutory provision is closely related to the State's antidegradation policy, and is certainly "reasonably related" to the purposes and policies of the CWA. *Escondido*, 466 U.S. 765. This being the case, the State was fully authorized to impose conditions in the Elkhorn project's § 401 certificate to ensure the project's compliance with this "appropriate" state law.

III. THE ELKHORN PROJECT WILL CAUSE A NUMBER OF DISCHARGES WHICH WILL CAUSE WATER POLLUTION AND, IN THE ABSENCE OF THE MINIMUM INSTREAM FLOW REQUIRED BY THE STATE, THESE DISCHARGES WILL VIOLATE STATE WATER QUALITY STANDARDS

After seven years of litigation, Petitioners now, for the first time, contend that the minimum flow requirement is invalid because it does not address a "discharge" from the Elkhorn project.³³ This contention is fundamentally flawed because it rests on an unduly narrow view of the term "discharge," within the meaning of § 401. Contrary to Petitioners' argument that states are limited to discharges "which add something" to the water, Congress used the term "discharge" broadly in § 401, thereby authorizing states to conduct a full examination of all of a project's discharges and their water quality impacts.

³³ It is axiomatic that issues not raised at trial cannot, absent special circumstances, be raised on appeal. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court. [Citations omitted.] . . . [The rule's] usual formation is: 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.' [Citing *Duignan v. United States*, 274 U.S. 195, 200 (1927).] *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Petitioners did not raise the discharge issue prior to their Petition for Writ of Certiorari.

A. A Section 401 "Discharge" Includes Any Discharge That Will Cause Water Pollution

Section 401(a)(1) provides that activities that "may result in any discharge" must be certified and that the state must determine that "any such discharge will comply with," *inter alia*, water quality standards. Section 502(16) defines the term "discharge" as follows: "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16).³⁴ Thus, the term "discharge" *includes* discharges of pollutants but it is not limited thereto,³⁵ and because § 401 uses the term without qualification, "discharge" in § 401 is not limited to discharges of pollutants. Petitioners do not contend otherwise.

What discharges then are covered by § 401? Given how "discharge" is used in § 401, Congress' intent in enacting the provision, and EPA's construction of it, it is appropriate to construe the term broadly to include any discharge that causes water "pollution."³⁶ This interpretation makes sense and, in marked contrast to Petitioners' suggested interpretation, fully effectuates § 401 and allows achievement of the CWA's objective to restore and maintain the chemical, physical and biological integrity of the nation's waters.

³⁴ The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."

³⁵ All of the other definitions in § 502 of the CWA use the prescriptive term "means." See 33 U.S.C. § 1362(1)-(15), (17)-(20). It is significant that the definition of discharge does not use this prescriptive term, but rather, uses the non-limiting term "includes." The use of this term plainly indicates congressional intent not to limit the term "discharge" to "discharges of pollutants."

³⁶ Section 502(19) defines "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19).

1. The terms of § 401 authorize states to examine fully all discharges from any federally licensed activities. Section 401's unqualified usage of "discharge" is the clearest evidence of this fact. Indeed, Congress uses "activity" and "discharge" interchangeably in § 401. In the sentence immediately following the clause upon which Petitioners place so much reliance, Congress uses the alternative "activity" phrasing to refer to the scope of certification authority. That subsequent sentence provides that "[i]n the case of any such *activity* for which there is not an applicable effluent limitation or other limitation [under the CWA], * * * the State shall so certify." See 33 U.S.C. § 1341(a)(1). (Emphasis added.)³⁷ In short, the manner in which "discharge" is used in § 401 does not support Petitioners' narrow view of state § 401 authority. To the contrary, it indicates congressional intent that states examine all of a facility's discharges and the water quality impacts resulting from those discharges.

2. The statute's legislative history also strongly suggests that the states are to perform a broad review of all discharges causing pollution resulting from a proposed activity. Section 401 finds its genesis in § 21(b) of the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970), which immediately preceded congressional enactment of § 401 as part of the comprehensive Federal Water Pollution Control Act

³⁷ To similar effect is § 401(a)(4). While that section is not at issue here, it too shows that Congress used "activity" and "discharge" interchangeably in § 401. It focuses on whether "the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements." 33 U.S.C. § 1341(a)(4). See also § 401(a)(3) (authorizing state review of "construction or operation of a facility") and § 401(a)(5) (authorizing revocation of federal license where "facility or activity" violates, *inter alia*, water quality standards.)

Amendments of 1972 (FWPCA), Pub. L. No. 92-500, 86 Stat. 816 (1972). Using language virtually identical to that currently found in § 401, § 21(b) required state certification for every federally licensed or permitted activity "which may result in any discharge into the navigable waters." Section 21(b) further authorized states to certify "that such *activity* will not violate applicable water quality standards." *Id.* (Emphasis added.)

In enacting § 401, Congress changed the wording of this clause by replacing "activity" with "discharge." The accompanying legislative history, however, reveals that Congress, unlike Petitioners, did not view this as a major substantive change. Legislative reports repeatedly characterized § 401 as being substantially the same as § 21(b), with the former reflecting only "minor" changes necessary to take account of the fact that the FWPCA superimposed an effluent limitation regulatory scheme on top of the pre-existing state water quality standards program. See S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971); H.R. Rep. No. 911, 92d Cong., 2d Sess. 121-24, 165 (1972), *reprinted in* Comm. on Public Works, 93d Cong. 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 753, 808-11, 852 (Comm. Print 1973). It is not surprising therefore that when Congress subsequently amended § 401 in 1977, the Conference Report described the section as providing for state certification that "a federally licensed or permitted *activity* * * * [will] comply with State water quality standards." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4471. (Emphasis added.)

3. Finally, EPA has long adopted the broader construction of a state's § 401 certification authority. According

to the agency's regulation implementing § 401, the state must certify that the federally licensed "activity will be conducted in a manner which will not violate water quality standards." 40 C.F.R. § 121.2(a)(3). (Emphasis added.) EPA's formal guidance provides:

[A]ll of the potential effects of a proposed activity on water quality — direct and indirect, short and long term, upstream and down-stream, construction and operation — should be part of a State's certification review.

See EPA, *Wetlands and 401 Certification* 23 (April, 1989). (Emphasis omitted.) Because EPA is the agency responsible for the CWA's implementation, EPA's long-standing and formal construction of § 401 in the face of any statutory ambiguity is entitled to judicial deference. See *Chevron*, 467 U.S. 837.

Thus, all of the usual tools of statutory construction indicate that Congress intended that under § 401 states perform a thorough examination of all of an activity's discharges and the water pollution caused by these discharges. In this way, Congress authorized states to examine all of the water quality impacts of federally licensed activities, and to ensure that such activities will comply with state water quality requirements.

B. The Elkhorn Project Will Cause A Number Of "Discharges" Causing Water Pollution.

The Elkhorn project will cause at least three kinds of "discharges" covered by § 401. These are (1) discharges of dredged and fill material, (2) discharges of pollutants, and (3) discharges of non-point source pollution.³⁸

³⁸ The term "non-point source" is not defined in the CWA, but refers to sources or causes of pollution emanating from other than point sources. Section 304(f), which authorizes EPA to issue non-point source pollution guidelines, identifies a number of non-point sources of pollution, including

1. Obviously, the Elkhorn project will cause a discharge of dredged and fill material. Such discharges are regulated directly by the Army Corps of Engineers (Corps) under § 404 of the CWA. 33 U.S.C. § 1344. The Corps has defined the term "discharge of fill material" to include the "building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; * * * [and] dams and dikes."³⁹ Thus, the Corps has defined dams themselves as "discharges" subject to the CWA.

In this case, then, the first, and most fundamental, discharge is the Elkhorn dam itself. It is this "discharge" that will violate water quality standards, necessitating the imposition of the minimum flow requirement. Petitioners, however, consider only the discharges resulting from construction and operation of the hydroelectric facility, and do not address the fact that the facility is itself a discharge into navigable waters. Unlike most activities that discharge into navigable waters, hydroelectric facilities are located (at least in part) in the waters themselves. Applying Petitioners' own definition of "discharge," the hydroelectric facility is itself "an addition of something to the receiving waters." (Pet. Br. 23.) (Emphasis in original.) It certainly cannot be gainsaid that hydroelectric facilities constitute a massive addition of material into the waters. That those structures serve a purpose and also

"changes in the movement, flow, or circulation of any navigable waters, * * * including changes caused by the construction of dams, * * * or flow diversion facilities." 33 U.S.C. § 1314(f)(F). See also EPA, *Non-Point Source Guidance*, App. B (Dec. 1987) (listing "Hydrological/Habitat Modification" through "dam construction" as sources of non-point pollution).

³⁹ 33 C.F.R. § 323.2(f) (1993) (emphasis added); 40 C.F.R. § 232.2(f) (1992).

further discharge into the waters in no way changes their initial status as a discharge.⁴⁰

There is also nothing in the CWA to support Petitioners' apparent assumption that the Act is not concerned with the adverse water quality effects that such a discharge can have by reducing flow. The CWA broadly defines water "pollution" to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). As described by the court below, quoting an EPA official, "protection of water quality involves more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life."⁴¹

One obvious way that discharges of fill material can affect the "biological integrity" of water, and thus constitute water pollution, is by obstructing flow. Certainly dumping massive amounts of materials into navigable waters can have just that result and, for that reason, be subject to regulation. Indeed, that is the primary focus of the CWA's § 404 permitting program that, as described by Petitioners themselves (Pet. Br. 24-25), requires "permits for the discharge of dredged or fill

⁴⁰ Petitioners are, for this reason, mistaken in claiming (Pet. Br. 29-30) that the State must certify Petitioners' project without condition because the discharges from that project will not add any pollutants not already present in the waters. Even assuming the validity of their assertion that their facility's discharges, like those at issue in *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) and *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), will not add anything to the water, that does not undermine the status of the facility itself as a discharge (of fill material). This discharge will cause pollution, thereby triggering § 401 certification authority under § 401(a).

⁴¹ Pet. App. 8a, quoting Resp. App. 90a (Letter from LaJuana Wilcher, Assistant Administrator of EPA to The Honorable Lois D. Cashell, Secretary of FERC).

material at specified disposal sites, whether or not from a 'point source.'" 40 C.F.R. § 232.2(f). Nor is there any statutory exemption based on the fact that the purpose of the discharge is in fact to obstruct and divert waters. Any discharge that obstructs and diverts waters, like other kinds of discharges, necessarily falls within the scope of the CWA and is subject to the Act's requirements, including § 401 and state water quality standards.

For this reason, it was entirely appropriate for the State in this case to exercise its § 401 authority to address the extent to which the Elkhorn project "discharge" will itself obstruct navigable waters. It was likewise appropriate for the State to address the adverse effects of this discharge in the most direct manner possible, which is by imposing a "limitation" that addresses instream flow levels. The State's action in this case is therefore entirely consistent with the language of § 401, including § 401(a)'s use of the word "discharge."

2. In addition to the Elkhorn project itself constituting a discharge, construction and operation of the project will cause a number of additional discharges of pollutants and pollution. Construction of the project will cause discharges of pollutants (dredge spoils, concrete) and non-point source pollution (soil erosion). (PCHB Ex. A-4, pp. E2-12 - E2-17.) Petitioners concede that these are discharges subject to § 401. (Pet. Br. 27-29.) During operation, river water will be diverted out of the channel, through the penstock and powerhouse, and then back to the channel through the tailrace. Petitioners again concede that this discharge is a discharge subject to § 401. (Pet. Br. 27-29.) These discharges alone trigger application of § 401 which allows

state review of all of the water pollution caused by the project's discharges.

3. Finally, operation of the dam will cause a discharge of pollution. At the dam itself, water from behind the dam will be discharged by sluice gate or through the fish ladder to the river channel below. This water will be significantly different than the water above the dam. Some minor physical and chemical changes, such as turbidity levels, dissolved gas concentrations, nutrient levels, and temperature increases are likely. (PCHB Ex. E2-17 - E2-22.) The major alteration, however, will be the flow reduction. All of these changes are man-induced alterations of the water's chemical, physical and biological integrity, and thus constitute pollution under the CWA. Therefore, operation of the dam itself will cause a discharge of pollution, which is directly addressed by the minimum instream flow requirement.⁴²

IV. FERC'S LICENSING AUTHORITY UNDER THE FEDERAL POWER ACT DOES NOT AFFECT OR AMEND STATE AUTHORITY UNDER SECTION 401 TO ENSURE COMPLIANCE WITH STATE WATER QUALITY STANDARDS

Petitioners would have this Court construe § 401 in light of the FPA and, more particularly, in a manner that Petitioners claim would reconcile the two laws. (See Pet. Br. 46-49.) Petitioners, however, fail to consider that § 401 applies to all

⁴² See *National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1484 (D.C. Cir. 1990) (affirming FERC's determination that where dam will cause soil erosion upstream of the dam, the dam's discharge nevertheless occurs at the dam, stating "Common sense supports FERC's conclusion that the discharge in this case would occur at the dam, where the flow of water would be blocked * * *.") See also *National Wildlife Fed'n v. Consumers Power*, 862 F.2d at 588 ("[g]enerally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the 'nonpoint source' category of pollution.")

federally licensed or permitted activities which may result in discharges into navigable waters. It does not apply just to FERC and hydroelectric facilities. For that reason, whether § 401 applies to the adverse water quality impacts of flow reduction and therefore authorizes the imposition of minimum instream flow requirements does not depend on the scope of FERC's authority under the FPA. In the absence of any explicit statutory exceptions, the answer under § 401 should be the same for all federally licensed or permitted activities.

1. There is, moreover, no such exception for FERC in § 401. FERC, like any other federal agency permitting an activity subject to § 401, must include any state-imposed conditions in its license. Section 401(d) provides, without exception, that any limitations set forth in the state certification "shall become a condition on any Federal license or permit * * *." FERC has accordingly ruled that it possesses no authority to review § 401 limitations. See *Town of Summersville*, 60 F.E.R.C. ¶ 61,291, at 61,990 (1992), *reh'g denied*, 63 F.E.R.C. ¶ 61,037 (1993). Under federal law, FERC must include them in its license. Congress has left no room for "harmonizing" efforts that exempt FERC from the scope of state authority otherwise applicable to federally licensed or permitted activities under § 401.

2. This Court's recent decision in *California v. FERC*, 495 U.S. 490 (1990) does not suggest otherwise. Petitioners cite repeatedly to that case, but it has little, if any, bearing on this case. In *California v. FERC*, this Court held that the FPA preempted the State of California from imposing minimum instream flow requirements on a FERC-licensed hydroelectric project that were more stringent than those FERC had included

in the license. *Id.* at 505-07. Unlike in this case, § 401 was not at issue and FERC had already issued its license, which California sought, in effect, to unilaterally amend pursuant to state law.

By contrast, in this case, FERC has not issued a license and the State claims its right to impose a minimum instream flow requirement on the applicant for a FERC license as a matter of federal law. The State readily acknowledges that its authority is derived from, and limited by, the terms of a federal statutory provision — § 401 of the CWA. The State does not claim that it can impose minimum instream flow requirements whenever it wishes on a FERC-licensed hydroelectric project. Nor does the State assert that it can impose minimum instream flow requirements to serve any otherwise legitimate governmental end. The State agrees that it can impose such requirements only pursuant to the procedural rules and substantive boundaries provided by Congress in § 401.

3. By its express terms, § 401 eliminates any possible preemption claim. As a matter of federal law, the state conditions become part of the federal license, including licenses issued by FERC, and therefore are, for obvious reasons, not subject to preemption. Because § 401(d) specifically provides that those limitations "shall become a condition on any Federal license or permit" (33 U.S.C. § 1341(d)), the limitations cannot, by definition, conflict with a FERC license; they are themselves part of the license.

Indeed, this result is entirely consonant with this Court's reasoning in *California v. FERC*. The Court emphasized in its decision in that case that courts "must * * * give full effect to evidence that Congress considered and sought to preserve the

states' coordinate regulatory role in our federal scheme." In ruling against the state in *California v. FERC*, the Court simply deferred to its prior ruling in *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946), that there was no such "evidence" in the FPA. Section 401 of the CWA, however, provides just such evidence of congressional consideration and that legislative judgment must, accordingly, be given "full effect."

4. Petitioners are similarly wrong in suggesting (Pet. Br. 46) that reading § 401 according to its plain terms would "subvert the [FPA]'s comprehensive licensing scheme." Their argument rests, at bottom, on a false image of the exclusivity of FERC's authority under that Act. FERC's authority is extensive, but not to the exclusion of the states and other federal agencies over many aspects of the construction, operation, and maintenance of hydroelectric facilities.

Indeed, § 401 establishes just that. By Petitioners' own admission, a state can exercise its § 401 authority over many aspects of a hydroelectric project seeking a FERC license based on its impact on water quality. Petitioners' only contention is that the State's jurisdiction does not extend to the adverse effects of flow reduction.

It is likewise clear that a hydroelectric project is subject to regulation under § 404 of the CWA, 33 U.S.C. § 1344. Under that provision, the Army Corps of Engineers may decide, based on its own weighing of many of the same environmental factors already considered by FERC pursuant to the FPA, that a FERC-approved hydropower project should be barred. See *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 816 (1987). The EPA, moreover, can independently veto the issuance of such a permit even if both

FERC and the Army Corps support its issuance. See § 404(c), 33 U.S.C. § 1344(c). And, because Congress specifically authorized EPA to allow administration of the § 404 permitting program by state agencies (see 33 U.S.C. § 1344(g) and (h)), a state, too, can exercise veto authority over a hydroelectric facility based on the state's independent assessment of water quality impacts already considered by FERC under the FPA.⁴³

Finally, this Court recently upheld the rights of another federal agency to impose conditions on FERC licenses over FERC's objection. In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984), the Court upheld the authority of the Secretary of the Interior to impose conditions on a FERC license issued to projects located within a federal Indian reservation. Because the wording and the purpose of the statutory provision at issue in *Escondido* is akin to § 401, *Escondido*, not *California v. FERC*, is this Court's precedent most relevant to the case now before the Court.

At issue in *Escondido* was the meaning of § 4(e) of the FPA, 16 U.S.C. § 797(e), which authorizes FERC to issue licenses for the construction, operation, and maintenance of hydroelectric project works located on the public lands and reservations of the United States. Section 4(e) provides that licenses issued under that section "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the

⁴³ See *Monongahela Power Co. v. Marsh*, 809 F.2d at 53. ("Given the two statutory sections and their legislative histories, congressional intent would be betrayed by implication of an exemption of FPC-licensed hydroelectric projects from the explicit requirements of [§ 404 of the CWA]. We do not view this as a 'repeal' of FPC authority but as a reconciliation seen by Congress as necessary to ensure the protection of a vital national interest.")

adequate protection and utilization of such reservation." 16 U.S.C. § 797(e).⁴⁴ FERC argued, notwithstanding the plain meaning of the statutory language, that it could reject any of the Secretary's conditions with which it disagreed. This Court disagreed with FERC.

Like Petitioners in this case, the petitioners in *Escondido* contended that the plain meaning of the statutory language should not be followed because "Congress could not have intended to empower the Secretary to require that conditions be included in the license over the objection of the Commission because that would frustrate the purpose of centralizing licensing procedures." 466 U.S. at 773. This Court was not persuaded. The Court responded that "while Congress intended that the Commission would have exclusive authority to issue all licenses, it wanted the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions." *Id.* at 775. In short, "Congress meant what it said" in § 4(e). *Id.*

Identical reasoning applies here. In enacting § 401(d), Congress simply wanted to allow those responsible for water pollution control "to play the major role in determining what

⁴⁴ Section 501(a) of the Federal Land and Policy Management Act also provides the Forest Service and Bureau of Land Management, not FERC, with the authority to decide whether to convey any right of way over public lands within their respective jurisdictions needed by a FERC licensee. See 43 U.S.C. § 1761(a)(4) (1988). In *California v. FERC*, 966 F.2d 1541 (9th Cir. 1992) (not related to the *California v. FERC* case discussed above), the Ninth Circuit severely limited the BLM's right to require rights of way for FERC-licensed hydroelectric projects. Congress immediately responded, clarifying and reaffirming the BLM's right to require rights of way for FERC licensees. Comprehensive Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XXIV, § 2401, 106 Stat. 3096-97 (amending section 501 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1761)).

conditions would be included in the license." 466 U.S. at 775. In many aspects of the CWA, the decisionmaker is a federal agency — either EPA or the Army Corps of Engineers. But, under § 401, Congress determined that the appropriate decisionmaker should be the states themselves. And, just like in § 4(e) of the FPA, Congress in § 401(d) of the CWA provided that those state limitations on certification "shall become a condition on any Federal license or permit." In short, "Congress meant what it said" in § 401(d), just like it did in § 4(e), and that congressional judgment is dispositive.

4. Finally, Petitioners' reliance (Pet. Br. 46, 48-49) on the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, 100 Stat. 1243, is entirely misdirected. Petitioners are hard pressed to claim that this Court should interpret the meaning of § 401 of the CWA, which Congress passed in 1972 and amended in 1977, based on the meaning of a wholly different law that a different Congress passed nine years later in 1986. But Petitioners (bravely) press on, notwithstanding their failure to proffer any evidence in either ECPA's statutory language or legislative history to suggest the slightest hint of congressional intent to address the CWA issue.

Congress enacted ECPA based on FERC's "less than satisfactory" past performance in considering environmental factors in its licensing determinations. H.R. Rep. 507, 99th Cong., 2d Sess. 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2504. ECPA accordingly required FERC to provide "equal consideration" to non-power values such as energy conservation, fish and wildlife protection, recreational opportunities, and the "preservation of other aspects of environmental quality" in deciding whether and under what

conditions to license a hydroelectric facility. 16 U.S.C. § 797(e). ECPA also added § 10(j) to the FPA, which requires FERC to "adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat * * *." 16 U.S.C. § 803(j)(1). Section 10(j) further requires FERC to impose conditions on licenses to serve those environmental ends, based on recommendations received from state and federal fish and wildlife agencies. 16 U.S.C. § 803(j)(1). And ECPA allows FERC to decline to impose those recommended conditions only if it makes specific findings under the FPA of their inconsistency with that Act. 16 U.S.C. § 803(j)(2).

ECPA, therefore, was designed to *limit* FERC's ability to discount environmental factors in its decisionmaking. Such a congressional purpose would seem an unlikely source of congressional intent to repeal § 401 of the CWA. Indeed, Petitioners' own brief explains why.

As Petitioners themselves acknowledge, albeit in a different context, "repeals by implication are disfavored. To the maximum extent possible, courts must read related statutes together in order to give effect to each; only when the sense and purpose of each cannot be preserved by such a reading is implied repeal recognized." (Pet. Br. 47, citing *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (citing *Morton v. Mancari*, 417 U.S. 535, 549 (1974).) No such irreconcilable conflict is presented between § 401 and ECPA. The plain meaning of each is that both the states, through § 401, and FERC, through ECPA, may consider the impact on water quality of flow reductions. A state can impose limitations through § 401 on instream flow reduction, but only to the extent permitted by § 401. While FERC cannot

provide less environmental protection, FERC can decide to provide more because its environmental protection authority is not as narrowly defined. Because, moreover, the state's limitation would necessarily be expressed as a "minimum," there would be no conflict presented between that state-imposed limitation and a higher "minimum" imposed by FERC itself pursuant to ECPA.

Finally, ECPA's legislative history removes any possible doubt regarding the invalidity of Petitioners' claim. The legislative history confirms what should already be obvious from the statutory language: ECPA in no way affects the terms of the CWA, including § 401. The House Report accompanying ECPA states in no uncertain terms that "the bill does not amend or change the Fish and Wildlife Coordination Act, NEPA, *or other environmental laws.*" H.R. Rep. No. 507, 99th Cong., 2d Sess. 21 (1986) (emphasis added).

CONCLUSION

For the foregoing reasons, the judgment of the Washington State Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Chapter 173-201 WAC
WATER QUALITY STANDARDS FOR WATERS OF
THE STATE OF WASHINGTON

WAC

173-201-010	Introduction.
173-201-025	Definitions.
173-201-035	General considerations.
173-201-045	General water use and criteria classes.
173-201-070	General classifications.
173-201-080	Specific classifications—Freshwater.
173-201-085	Specific classifications—Marine water.
173-201-090	Achievement considerations.
173-201-100	Implementation.
173-201-110	Surveillance.
173-201-120	Enforcement.

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS
CHAPTER

173-201-020	Water use and quality criteria. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-020, filed 1/17/78; Order 73-4, § 173-201-020, filed 7/6/73.] Repealed by 82-12-078 (Order DE 82-12), filed 6/2/82. Statutory Authority: RCW 90.48.035.
173-201-030	Water use and quality criteria—General water use and criteria classes. [Order 73-4, § 173-201-030, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035.
173-201-040	Water use and quality criteria—General considerations. [Order 73-4, § 173-201-040, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035.
173-201-050	Characteristic uses to be protected. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-050, filed 1/17/78; Order 73-4, § 173-201-050, filed 7/6/73.] Repealed by 82-12-078 (Order DE 82-12), filed 6/2/82. Statutory Authority: RCW 90.48.035.
173-201-060	Water course classification. [Order 73-4, § 173-201-060, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035.
173-201-130	Definitions. [Order 73-4, § 173-201-130, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035.
173-201-140	Miscellaneous. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-140, filed 1/17/78; Order 73-4, § 173-201-140, filed 7/6/73.] Repealed by 82-12-078 (Order DE 82-12), filed 6/2/82. Statutory Authority: RCW 90.48.035.

WAC 173-201-010 Introduction. (1) The purpose of this chapter is to establish water quality standards for surface waters of the state of Washington pursuant to the provisions of chapter 90.48 RCW and the policies and purposes thereof.

(2) This chapter shall be reviewed periodically by the department and appropriate revisions shall be undertaken.

(3) The water use and quality criteria set forth in WAC 173-201-035 through 173-201-085 are established in conformance with present and potential water uses of the surface waters of the state of Washington and in consideration of the natural water quality potential and limitations of the same. These shall be the sole criteria for said waters.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-010, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-010, filed 1/17/78; Order 73-4, § 173-201-010, filed 7/6/73.]

WAC 173-201-025 Definitions. (1) Background conditions: The biological, chemical, and physical conditions of a water body, upstream from the point or non-point source of any discharge under consideration. Background sampling location in an enforcement action would be upstream from the point of discharge, but not upstream from other inflows. If several discharges to any water body exist, and enforcement action is being taken for possible violations to the standards, background sampling would be undertaken immediately upstream from each discharge.

(2) Department: State of Washington department of ecology.

(3) Director: Director of the state of Washington department of ecology.

(4) Fecal coliform: That portion of the coliform group which is present in the intestinal tracts and feces of warm-blooded animals as detected by the product of acid or gas from lactose in a suitable culture medium within 24 hours at 44.5 plus or minus 0.2 degrees Celsius.

(5) Geometric mean: The nth root of a product of n factors.

(6) Mean detention time: The time obtained by dividing a reservoir's mean annual minimum total storage by the 30-day ten-year low-flow from the reservoir.

(7) Permit: A document issued pursuant to RCW 90.48.160 et seq. or 90.48.260 or both, specifying the waste

treatment and control requirements and waste discharge conditions.

(8) pH: The negative logarithm of the hydrogen ion concentration.

(9) Primary contact recreation: Activities where a person would have direct contact with water to the point of complete submergence, including but not limited to skin diving, swimming and water skiing.

(10) Secondary contact recreation: Activities where a person's water contact would be limited (wading or fishing) to the extent that bacterial infections of eyes, ears, respiratory or digestive systems or urogenital areas would normally be avoided.

(11) Surface waters of the state: Include lakes, rivers, ponds, streams, inland waters, saltwaters, and all other surface waters and water courses within the jurisdiction of the state of Washington.

(12) Temperature: Water temperature expressed in degrees Celsius (°C).

(13) Turbidity: The clarity of water expressed as nephelometric turbidity units (NTU) and measured with a calibrated turbidimeter.

(14) Upwelling: The annual natural phenomenon where the summer prevailing, northerly winds parallel to Washington's coast produce a seaward transport of surface waters. Cold, deeper more saline waters rich in nutrients and low in dissolved oxygen rise to replace the surface water. The cold, oxygen deficient water flows into Puget Sound and other coastal estuaries replacing the deep water with lower dissolved oxygen concentrations reaching the surface during late summer and fall.

(15) USEPA: United States Environmental Protection Agency.

(16) Wildlife habitat: Waters of the state used by fish, other aquatic life and wildlife for any life history stage or activity.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-025, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-025, filed 1/17/78.]

WAC 173-201-035 General considerations. The following general guidelines shall apply to the water quality criteria and classifications set forth in WAC 173-201-045 through 173-201-085 hereof:

(1) At the boundary between waters of different classifications, the water quality criteria for the higher classification shall prevail.

(2) In brackish waters of estuaries, where the fresh and marine water quality criteria differ within the same classification, the criteria shall be interpolated on the basis of salinity; except that the marine water quality criteria shall apply for dissolved oxygen when the salinity is one part per thousand or greater and for fecal coliform organisms when the salinity is ten parts per thousand or greater.

(3) The water quality criteria herein established shall not apply within an authorized dilution zone adjacent to or surrounding a waste-water discharge.

(4) Generally, waste discharge permits, whether issued pursuant to the National Pollutant Discharge Elimination System or otherwise, shall be conditioned in such manner as to authorize discharges which meet the water quality standards.

(a) However, persons discharging wastes in compliance with the terms and conditions of permits shall not be subject to civil and criminal penalties on the basis that discharge violates water quality standards.

(b) Permits shall be subject to modification by the department whenever it appears to the department the discharge violates water quality standards. Modification of permits, as provided herein, shall be subject to review in the same manner as originally issued permits.

(5) Nonpoint sources and water quality standards.

(a) It is recognized that many activities not subject to a waste discharge permit system are now being performed in the state, which result in conflicts with the water quality standards of this chapter. Further, the department has not developed a program which, in a reasonable or fully satisfactory manner, provides methods or means for meeting such standards. Persons conducting such activities shall not be subject to civil or criminal sanctions for violation of water quality standards if the activities are either:

(i) Conducted in accordance with management practices set forth by rules of the department.

For example, promulgation of regulations by the department which set forth approved management practices or other effluent limits shall be accomplished so that activities conducted within such regulations, (i.e., forest practices rules and regulations chapter 173-202 WAC and Title 222 WAC) will achieve compliance with water pollution control laws. When the regulations are violated, the water quality standard can be enforced as

described in WAC 173-201-045 through 173-201-085; or,

(ii) Subject to a regulatory order issued by the department relating to specific activities as provided for in WAC 173-201-100(2).

(b) Management practices or regulatory orders described in WAC 173-201-035(5) hereof, shall be subject to modification by the department whenever it appears to the department that the discharge violates water quality standards. Modification of management practices or regulatory orders, as provided herein, shall be subject to review in the same manner as the originally issued management practices or regulatory orders.

(6) The water quality criteria herein established for total dissolved gas shall not apply when the stream flow exceeds the 7-day, 10-year frequency flood.

(7) The total area and/or volume of a receiving water assigned to a dilution zone shall be as described in a valid discharge permit as needed and be limited to that which will:

(a) Not cause acute mortalities of sport, food, or commercial fish and shellfish species of established biological communities within populations or important species to a degree which damages the ecosystem.

(b) Not diminish aesthetic values or other beneficial uses disproportionately.

(8) The antidegradation policy of the state of Washington, as generally guided by chapter 90.48 RCW, Water Pollution Control Act, and chapter 90.54 RCW, Water Resources Act of 1971, is stated as follows:

(a) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

(b) No degradation will be allowed of waters lying in national parks, national recreation areas, national wildlife refuges, national scenic rivers, and other areas of national ecological importance.

(c) Whenever waters are of a higher quality than the criteria assigned for said waters, the existing water quality shall be protected and waste and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except, in those instances where:

(i) It is clear that overriding considerations of the public interest will be served, and

(ii) All wastes and other materials and substances proposed for discharge into the said waters shall be provided with all known, available, and reasonable methods of treatment before discharge.

(d) Whenever the natural conditions of said waters are of a lower quality than the criteria assigned, the natural conditions shall constitute the water quality criteria.

(e) The criteria and special conditions established in WAC 173-201-045 through 173-201-085 may be modified for a specific water body on a short-term basis when necessary to accommodate essential activities, respond to emergencies, or to otherwise protect the public interest. Such modification shall be issued in writing by the director or his designee subject to such terms and conditions as he may prescribe. The aquatic application of herbicides which result in water use restrictions shall be considered an activity for which a short-term modification generally may be issued subject to the following conditions:

(i) A request for a short-term modification shall be made to the department on forms supplied by the department. Such request generally shall be made at least thirty days prior to herbicide application.

(ii) Such herbicide application shall be in accordance with state of Washington department of agriculture regulations.

(iii) Such herbicide application shall be in accordance with label provisions promulgated by USEPA under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended. (7 U.S.C. 136, et seq.)

(iv) Notice, including identification of the herbicide, applicator, location where the herbicide will be applied, proposed timing and method of application, and water use restrictions shall be given according to the following requirements:

(A) Appropriate public notice as determined and prescribed by the director or his designee shall be given of any water use restrictions specified in USEPA label provisions.

(B) The appropriate regional offices of the departments of fisheries and game shall be notified twenty-four hours prior to herbicide application.

(C) In the event of any fish kills, the departments of ecology, fisheries, and game shall be notified immediately.

(v) The herbicide application shall be made at times so as to:

(A) Minimize public water use restrictions during weekends.

(B) Completely avoid public water use restrictions during the opening week of fishing season, Memorial Day weekend, July 4 weekend, and Labor Day weekend.

(vi) Any additional conditions as may be prescribed by the director or his designee.

(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term and irreparable harm to the environment.

(g) No waste discharge permit will be issued which violates established water quality criteria, except, as provided for under WAC 173-201-035 (8)(e).

(9) Due consideration will be given to the precision and accuracy of the sampling and analytical methods used as well as existing conditions at the time, in the application of the criteria.

(10) The analytical testing methods for these criteria shall be in accordance with the most recent editions of "Standard Methods for the Examination of Water and Wastewater," published by the American Public Health Association, American Water Works Association, and the Water Pollution Control Federation, and "Methods for Chemical Analysis of Water and Wastes," published by USEPA, and other or superseding methods published and/or approved by the department following consultation with adjacent states and concurrence of the USEPA.

(11) Deleterious concentrations of radioactive materials for all classes shall be as determined by the lowest practicable concentration attainable and in no case shall exceed:

(a) 1/100 of the values listed in WAC 402-24-220 (Column 2, Table II, Appendix A, rules and regulations for radiation protection); or,

(b) USEPA Drinking Water Regulations for radionuclides, as published in the Federal Register of July 9, 1976, or subsequent revisions thereto.

(12) Deleterious concentrations of toxic, or other non-radioactive materials, shall be determined by the department in consideration of the Quality Criteria for Water, published by USEPA 1976, and as revised, as the authoritative source for criteria and/or other relevant information, if justified.

(13) Nothing in this chapter shall be interpreted to be applicable to those aspects of governmental regulation of radioactive wastes which have been preempted from state regulation by the Atomic Energy Act of 1954, as amended, as interpreted by the United States Supreme Court in the cases of *Northern States Power Co. v. Minnesota* 405 U.S. 1035 (1972) and *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976).

(14) Nothing in this chapter shall be interpreted to prohibit the establishment of effluent limitations for the control of the thermal component of any discharge in accordance with Section 316 of the Federal Clean Water Act (P.L. 95-217 as amended).

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-035, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-035, filed 1/17/78.]

WAC 173-201-045 General water use and criteria classes. The following criteria shall apply to the various classes of surface waters in the state of Washington:

(1) **Class AA (extraordinary).**

(a) General characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, spawning, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam, oyster, and mussel rearing, spawning, and harvesting.

Crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria.

(i) Fecal coliform organisms.

(A) Freshwater – fecal coliform organisms shall not exceed a geometric mean value of 50 organisms/100 mL, with not more than 10 percent of samples exceeding 100 organisms/100 mL.

(B) Marine water – fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/100 mL, with not more than 10 percent of samples exceeding 43 organisms/100 mL.

(ii) Dissolved oxygen.

(A) Freshwater – dissolved oxygen shall exceed 9.5 mg/L.

(B) Marine water – dissolved oxygen shall exceed 7.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 7.0 mg/L, natural dissolved oxygen levels can be degraded by up to 0.2 mg/L by man-caused activities.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature shall not exceed 16.0°C (freshwater) or 13.0°C (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t = 23 / (T + 5)$ (freshwater) or $t = 8 / (T - 4)$ (marine water).

When natural conditions exceed 16.0°C (freshwater) and 13.0°C (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8°C, and the maximum water temperature shall not exceed 16.3°C (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) or 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.2 units.

(vi) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste.

(2) **Class A (excellent).**

(a) General characteristic. Water quality of this class

shall meet or exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, spawning, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam, oyster, and mussel rearing, spawning, and harvesting.

Crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria.

(i) Fecal coliform organisms.

(A) Freshwater – fecal coliform organisms shall not exceed a geometric mean value of 100 organisms/100 mL, with not more than 10 percent of samples exceeding 200 organisms/100 mL.

(B) Marine water – fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/100 mL, with not more than 10 percent of samples exceeding 43 organisms/100 mL.

(ii) Dissolved oxygen.

(A) Freshwater – dissolved oxygen shall exceed 8.0 mg/L.

(B) Marine water – dissolved oxygen shall exceed 6.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 6.0 mg/L, natural dissolved oxygen levels can be degraded by up to 0.2 mg/L by man-caused activities.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature shall not exceed 18.0°C (freshwater) or 16.0°C (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t = 28 / (T + 7)$ (freshwater) or $t = 12 / (T - 2)$ (marine water).

When natural conditions exceed 18.0°C (freshwater) and 16.0°C (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8°C, and the maximum water temperature shall not exceed 18.3°C (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) or 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.5 units.

(vi) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those of public health significance, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect any water use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste.

(3) Class B (good).

(a) General characteristic. Water quality of this class shall meet or exceed the requirements for most uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (industrial and agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam, oyster, and mussel rearing and spawning.

Crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (secondary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria.

(i) Fecal coliform organisms.

(A) Freshwater – fecal coliform organisms shall not exceed a geometric mean value of 200 organisms/100

mL, with not more than 10 percent of samples exceeding 400 organisms/100 mL.

(B) Marine water – fecal coliform organisms shall not exceed a geometric mean value of 100 organisms/100 mL, with not more than 10 percent of samples exceeding 200 organisms/100 mL.

(ii) Dissolved oxygen.

(A) Freshwater – dissolved oxygen shall exceed 6.5 mg/L.

(B) Marine water – dissolved oxygen shall exceed 5.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 5.0 mg/L, natural dissolved oxygen levels can be degraded by up to 0.2 mg/L by man-caused activities.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature shall not exceed 21.0°C (freshwater) or 19.0°C (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t = 34/(T+9)$ (freshwater) or $t = 16/T$ (marine water).

When natural conditions exceed 21.0°C (freshwater) and 19.0°C (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8°C, and the maximum water temperature shall not exceed 21.3°C (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) and 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.5 units.

(vi) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those which adversely affect public health during characteristic uses, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect characteristic water uses.

(viii) Aesthetic values shall not be reduced by dis-

solved, suspended, floating, or submerged matter not attributed to natural causes, so as to affect water use or taint the flesh of edible species.

(4) **Class C (fair).**

(a) General characteristic. Water quality of this class shall meet or exceed the requirements of selected and essential uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (industrial).

(ii) Fish (salmonid and other fish migration).

(iii) Recreation (secondary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(iv) Commerce and navigation.

(c) Water quality criteria – marine water.

(i) Fecal coliform organisms shall not exceed a geometric mean value of 200 organisms/100 mL, with not more than 10 percent of samples exceeding 400 organisms/100 mL.

(ii) Dissolved oxygen shall exceed 4.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 4.0 mg/L, natural dissolved oxygen levels can be degraded by up to 0.2 mg/L by man-caused activities.

(iii) Temperature shall not exceed 22.0°C due to human activities. Temperature increases shall not, at any time, exceed $t = 20/(T+2)$.

When natural conditions exceed 22.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

(iv) pH shall be within the range of 6.5 to 9.0 with a man-caused variation within a range of less than 0.5 units.

(v) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vi) Toxic, radioactive, or deleterious material concentrations shall be below those which adversely affect public health during characteristic uses, or which may cause acute or chronic toxic conditions to the aquatic

biota, or which may adversely affect characteristic water uses.

(vii) Aesthetic values shall not be interfered with by the presence of obnoxious wastes, slimes, aquatic growths, or materials which will taint the flesh of edible species.

(5) Lake class.

(a) General characteristic. Water quality of this class shall meet or exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, spawning, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam and mussel rearing, spawning, and harvesting.

Crayfish rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria.

(i) Fecal coliform organisms shall not exceed a geometric mean value of 50 organisms/100 mL, with not more than 10 percent of samples exceeding 100 organisms/100 mL.

(ii) Dissolved oxygen – no measurable decrease from natural conditions.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature – no measurable change from natural conditions.

(v) pH – no measurable change from natural conditions.

(vi) Turbidity shall not exceed 5 NTU over background conditions.

(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of

natural origin, which offend the senses of sight, smell, touch, or taste.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-045, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-045, filed 1/17/78.]

WAC 173-201-070 General classifications. General classifications applying to various surface water bodies not specifically classified under WAC 173-201-080 or 173-201-085 are as follows:

(1) All surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas, are classified Class AA or lake class.

(2) All lakes and their feeder streams within the state are classified lake class and Class AA respectively, except for those feeder streams specifically classified otherwise.

(3) All reservoirs with a mean detention time of greater than 15 days are classified lake class.

(4) All reservoirs with a mean detention time of 15 days or less are classified the same as the river section in which they are located.

(5) All reservoirs established on preexisting lakes are classified as lake class.

(6) All unclassified surface waters that are tributaries to Class AA waters are classified Class AA. All other unclassified surface waters within the state are hereby classified Class A.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-070, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-070, filed 1/17/78; Order 73-4, § 173-201-070, filed 7/6/73.]

WAC 173-201-080 Specific classifications—Freshwater. Specific fresh surface waters of the state of Washington are classified as follows:

- | | |
|---|----------|
| (1) American River. | Class AA |
| (2) Big Quilcene River and tributaries. | Class AA |
| (3) Bumping River. | Class AA |
| (4) Burnt Bridge Creek. | Class A |
| (5) Cedar River from Lake Washington to Landsburg Dam (river mile 21.6). | Class A |
| (6) Cedar River and tributaries from Landsburg Dam (river mile 21.6) to headwaters. Special condition – no waste discharge will be permitted. | Class AA |
| (7) Chehalis River from upper boundary | |

of Grays Harbor at Cosmopolis (river mile 3.1, longitude 123°45'45" W) to Scammon Creek (river mile 65.8).

Class A

(8) Chehalis River from Scammon Creek (river mile 65.8) to Newaukum River (river mile 75.2). Special condition - dissolved oxygen shall exceed 5.0 mg/L from June 1, to September 15. For the remainder of the year, the dissolved oxygen shall meet Class A criteria.

Class A

(9) Chehalis River from Newaukum River (river mile 75.2) to Rock Creek (river mile 106.7).

Class A

(10) Chehalis River, from Rock Creek (river mile 106.7) to headwaters.

Class AA

(11) Chehalis River, south fork.

Class A

(12) Chewack River.

Class AA

(13) Chiwawa River.

Class AA

(14) Cispus River.

Class AA

(15) Clearwater River.

Class A

(16) Cle Elum River.

Class AA

(17) Cloquallum Creek.

Class A

(18) Clover Creek from outlet of Lake Spanaway to inlet of Lake Steilacoom.

Class A

(19) Columbia River from mouth to the Washington-Oregon border (river mile 309.3). Special conditions - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed 0.3°C due to any single source or 1.1°C due to all such activities combined. Dissolved oxygen shall exceed 90 percent of saturation.

Class A

(20) Columbia River from Washington-Oregon border (river mile 309.3) to Grand Coulee Dam (river mile 596.6). Special condition from Washington-Oregon border (river mile 309.3) to Priest Rapids Dam (river mile 397.1). Temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater

than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(21) Columbia River from Grand Coulee Dam (river mile 596.6) to Canadian border (river mile 745.0).

Class AA

(22) Colville River.

Class A

(23) Coweeman River from mouth to Mulholland Creek (river mile 18.4).

Class A

(24) Coweeman River from Mulholland Creek (river mile 18.4) to headwaters.

Class AA

(25) Cowlitz River from mouth to base of Riffe Lake Dam (river mile 52.0).

Class A

(26) Cowlitz River from base of Riffe Lake Dam (river mile 52.0) to headwaters.

Class AA

(27) Crab Creek and tributaries.

Class B

(28) Decker Creek.

Class AA

(29) Deschutes River from mouth to boundary of Snoqualmie National Forest (river mile 48.2).

Class A

(30) Deschutes River from boundary of Snoqualmie National Forest (river mile 48.2) to headwaters.

Class AA

(31) Dickey River.

Class A

(32) Dosewallips River and tributaries.

Class AA

(33) Duckabush River and tributaries.

Class AA

(34) Dungeness River from mouth to Canyon Creek (river mile 10.8).

Class A

(35) Dungeness River and tributaries from Canyon Creek (river mile 10.8) to headwaters.

Class AA

(36) Duwamish River from mouth south of a line bearing 254°true from the NW corner of berth 3, terminal No. 37 to the Black River (river mile 11.0) (Duwamish River continues as the Green River above the Black River).

Class B

(37) Elochoman River.

Class A

(38) Elwha River and tributaries.

Class AA

(39) Entiat River from Wenatchee National Forest boundary (river mile 20.5) to headwaters.

Class AA

(40) Grande Ronde River from mouth to Oregon border (river mile 37). Special condition - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise

the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

(41) Grays River from Grays River Falls (river mile 15.8) to headwaters.

(42) Green River (Cowlitz County).

(43) Green River (King County) from Black River (river mile 11.0 and point where Duwamish River continues as the Green River) to west boundary of Sec. 27-T21N-R6E (west boundary of Flaming Geyser State Park at river mile 42.3).

(44) Green River (King County) from west boundary of Sec. 27-T21N-R6E (west boundary of Flaming Geyser State Park, river mile 42.3) to west boundary of Sec. 13-T21N-R7E (river mile 59.1).

(45) Green River and tributaries (King County) from west boundary of Sec. 13-T21N-R7E (river mile 59.1) to headwaters. Special condition - no waste discharge will be permitted.

(46) Hamma Hamma River and tributaries.

(47) Hanaford Creek from mouth to east boundary of Sec. 25-T15N-R2W (river mile 4.1). Special condition - dissolved oxygen shall exceed 6.5 mg/L.

(48) Hanaford Creek from east boundary of Sec. 25-T15N-R2W (river mile 4.1) to headwaters.

(49) Hoh River and tributaries.

(50) Hoquiam River (continues as west fork above east fork) from mouth to river mile 9.3 (Dekay Road bridge) (upper limit of tidal influence).

(51) Humptulips River and tributaries from mouth to Olympic National Forest boundary on east fork (river mile 12.8) and west fork (river mile 40.4) (main stem continues as west fork).

(52) Humptulips River, east fork from Olympic National Forest boundary (river mile 12.8) to headwaters.

(53) Humptulips River, west fork from Olympic National Forest boundary (river mile 40.4) to headwaters.

Class A

Class AA

Class AA

Class A

Class AA

Class AA

Class AA

Class A

Class A

Class AA

Class B

Class A

Class AA

Class AA

(54) Issaquah Creek.

(55) Kalama River from lower Kalama River Falls (river mile 10.4) to headwaters.

(56) Klickitat River from Little Klickitat River (river mile 19.8) to headwaters.

(57) Lake Washington Ship Canal from Government Locks (river mile 1.0) to Lake Washington (river mile 8.6). Special condition - salinity shall not exceed one part per thousand (1.0 ppt) at any point or depth along a line that transects the ship canal at the University Bridge (river mile 6.1).

(58) Lewis River, east fork, from Multon Falls (river mile 24.6) to headwaters.

(59) Little Wenatchee River.

(60) Methow River from mouth to Chewack River (river mile 50.1).

(61) Methow River from Chewack River (river mile 50.1) to headwaters.

(62) Mill Creek from mouth to 13th street bridge in Walla Walla (river mile 6.4). Special condition - dissolved oxygen concentration shall exceed 5.0 mg/L.

(63) Mill Creek from 13th Street bridge in Walla Walla (river mile 6.4) to Walla Walla Waterworks Dam (river mile 25.2).

(64) Mill Creek and tributaries from city of Walla Walla Waterworks Dam (river mile 25.2) to headwaters. Special condition - no waste discharge will be permitted.

(65) Naches River from Snoqualmie National Forest boundary (river mile 35.7) to headwaters.

(66) Naselle River from Naselle "Falls" (cascade at river mile 18.6) to headwaters.

(67) Newaukum River.

(68) Nisqually River from mouth to Alder Dam (river mile 44.2).

(69) Nisqually River from Alder Dam (river mile 44.2) to headwaters.

(70) Nooksack River from mouth to Maple Creek (river mile 49.7).

(71) Nooksack River from Maple Creek (river mile 49.7) to headwaters.

(72) Nooksack River, south fork, from mouth to Skookum Creek (river mile 14.3).

(73) Nooksack River, south fork, from

Class A

Class AA

Class AA

Lake Class

Class AA

Class AA

Class A

Class AA

Class B

Class A

Class AA

Class AA

Class AA

Class A

Class A

Class AA

Class A

Class AA

Class A

20a

Skookum Creek (river mile 14.3) to headwaters.

Class AA

(74) Nooksack River, middle fork.

Class AA

(75) Okanogan River.

Class A

(76) Palouse River from mouth to south fork (Colfax, river mile 89.6).

Class B

(77) Palouse River from south fork (Colfax, river mile 89.6) to Idaho border (river mile 123.4). Special condition - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(78) Pend Oreille River from Canadian border (river mile 16.0) to Idaho border (river mile 87.7). Special condition - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(79) Pilchuck River from city of Snohomish Waterworks Dam (river mile 26.8) to headwaters.

Class AA

(80) Puyallup River from mouth to river mile 1.0.

Class B

(81) Puyallup River from river mile 1.0 to Kings Creek (river mile 31.6).

Class A

(82) Puyallup River from Kings Creek (river mile 31.6) to headwaters.

Class AA

(83) Queets River and tributaries.

Class AA

(84) Quillayute River.

Class AA

(85) Quinault River and tributaries.

Class AA

(86) Salmon Creek (Clark County).

Class A

(87) Satsop River from mouth to west fork (river mile 6.4).

Class A

(88) Satsop River, east fork.

Class AA

(89) Satsop River, middle fork.

Class AA

(90) Satsop River, west fork.

Class AA

(91) Skagit River from mouth to Skiyou Slough-lower end (river mile 25.6).

Class A

(92) Skagit River and tributaries (in-

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cludes Baker, Suak, Suiattle, and Cascade rivers) from Skiyou Slough-lower end, (river mile 25.6) to Canadian border (river mile 127.0).

Class AA

(93) Skokomish River and tributaries.

Class AA

(94) Skookumchuck River from Bloody Run Creek (river mile 21.4) to headwaters.

Class AA

(95) Skykomish River from mouth to May Creek (above Gold Bar at river mile 41.2).

Class A

(96) Skykomish River from May Creek (above Gold Bar at river mile 41.2) to headwaters.

Class AA

(97) Snake River from mouth to Washington-Idaho-Oregon border (river mile 176.1). Special condition.

(a) Below Clearwater River (river mile 139.3). Temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

(b) Above Clearwater River (river mile 139.3). Temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed 0.3°C due to any single source or 1.1°C due to all such activities combined.

Class A

(98) Snohomish River from mouth and east of longitude 122°13'40"W upstream to latitude 47°56'30"N (southern tip of Ebey Island river mile 8.1). Special condition - fecal coliform organisms shall not exceed a geometric mean value of 200 organisms/100 mL, with not more than 10 percent of samples exceeding 400 organisms/100 mL.

Class A

(99) Snohomish River upstream from latitude 47°56'30"N (southern tip of Ebey Island river mile 8.1) to confluence with Skykomish and Snoqualmie River (river mile 20.5).

Class A

(100) Snoqualmie River and tributaries from mouth to west boundary of Twin Falls State Park on south fork (river mile 9.1).	Class A
(101) Snoqualmie River, middle fork.	Class AA
(102) Snoqualmie River, north fork.	Class AA
(103) Snoqualmie River, south fork, from west boundary of Twin Falls State Park (river mile 9.1) to headwaters.	Class AA
(104) Soleduck River and tributaries.	Class AA
(105) Spokane River from mouth to Idaho border (river mile 96.5). Special condition - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.	Class A
(106) Stehekin River.	Class AA
(107) Stillaguamish River from mouth to north and south forks (river mile 17.8).	Class A
(108) Stillaguamish River, north fork, from mouth to Squire Creek (river mile 31.2).	Class A
(109) Stillaguamish River, north fork, from Squire Creek (river mile 31.2) to headwaters.	Class AA
(110) Stillaguamish River, south fork, from mouth to Canyon Creek (river mile 33.7).	Class A
(111) Stillaguamish River, south fork, from Canyon Creek (river mile 33.7) to the headwaters.	Class AA
(112) Sulphur Creek.	Class B
(113) Sultan River from mouth to Chaplain Creek (river mile 5.9).	Class A
(114) Sultan River and tributaries from Chaplain Creek (river mile 5.9) to headwaters. Special condition - no waste discharge will be permitted above city of Everett Diversion Dam (river mile 9.4).	Class AA
(115) Sumas River from Canadian border (river mile 12) to headwaters (river mile 23).	Class A
(116) Tieton River.	Class AA
(117) Tolt River, south fork and tributaries	

ies from mouth to west boundary of Sec. 31-T26N-R9E (river mile 6.9).	Class AA
(118) Tolt River, south fork from west boundary of Sec. 31-T26N-R9E (river mile 6.9) to headwaters. Special condition - no waste discharge will be permitted.	Class AA
(119) Touchet River, north fork from Dayton water intake structure (river mile 3.0) to headwaters.	Class AA
(120) Toutle River, north fork, from Green River to headwaters.	Class AA
(121) Toutle River, south fork.	Class AA
(122) Tucannon River from Umatilla National Forest boundary (river mile 38.1) to headwaters.	Class AA
(123) Twisp River.	Class AA
(124) Union River and tributaries from Bremerton Waterworks Dam (river mile 6.9) to headwaters. Special condition - no waste discharge will be permitted.	Class AA
(125) Walla Walla River from mouth to Lowden (Dry Creek at river mile 27.2).	Class B
(126) Walla Walla River from Lowden (Dry Creek at river mile 27.2) to Oregon border (river mile 40). Special condition - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.	Class A
(127) Wenatchee River from Wenatchee National Forest boundary (river mile 27.1) to headwaters.	Class AA
(128) White River (Pierce-King counties) from Mud Mountain Dam (river mile 29.6) to headwaters.	Class AA
(129) White River (Chelan County).	Class AA
(130) Wildcat Creek.	Class A
(131) Willapa River upstream of a line bearing 70° true through Mailboat Slough light (river mile 1.8).	Class A
(132) Wishkah River from mouth to river mile 6 (SW 1/4 SW 1/4 NE 1/4 Sec. 21-T18N-R9W).	Class B

(133) Wishkah River from river mile 6 (SW 1/4 SW 1/4 NE 1/4 Sec. 21-T18N-R9W) to west fork (river mile 17.7).

Class A

(134) Wishkah River from west fork of Wishkah River (river mile 17.7) to south boundary of Sec. 33-T21N-R8W (river mile 32.0).

Class AA

(135) Wishkah River and tributaries from south boundary of Sec. 33-T21N-R8W (river mile 32.0) to headwaters. Special condition - no waste discharge will be permitted.

Class AA

(136) Wynoochee River from mouth to Olympic National Forest boundary (river mile 45.9).

Class A

(137) Wynoochee River from Olympic National Forest boundary (river mile 45.9) to headwaters.

Class AA

(138) Yakima River from mouth to Sunnyside Dam (river mile 103.8).

Class B

(139) Yakima River from Sunnyside Dam (river mile 103.8) to Cle Elum River (river mile 185.6). Special condition - temperature shall not exceed 21.0°C due to human activities. When natural conditions exceed 21.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t = 34 / (T + 9)$.

Class A

(140) Yakima River from Cle Elum River (river mile 185.6) to headwaters.

Class AA

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-080, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-080, filed 1/17/78; Order DE 73-22, § 173-201-080, filed 11/16/73; Order 73-4, § 173-201-080, filed 7/6/73.]

WAC 173-201-085 Specific classifications—Marine water. Specific marine surface waters of the state of Washington are classified as follows:

(1) Budd Inlet south of latitude 47°04'N (south of Priest Point Park).

Class B

(2) Coastal waters: Pacific Ocean from Ilwaco to Cape Flattery.

Class AA

(3) Commencement Bay south and east of a line bearing 258° true from "Brown's

point" and north and west of line bearing 225° true through the Hylebos waterway light.

Class A

(4) Commencement Bay, inner, south and east of a line bearing 225° true through Hylebos Waterway light except the city waterway south and east of south 11th Street.

Class B

(5) Commencement Bay, city waterway south and east of south 11th Street.

Class C

(6) Drayton Harbor, south of entrance.

Class A

(7) Dyes and Sinclair Inlets west of longitude 122°37'W.

Class A

(8) Elliott Bay east of a line between Pier 91 and Duwamish head.

Class A

(9) Everett Harbor, inner, north and east of a line bearing 121° true from light "4" (Snohomish River mouth).

Class B

(10) Grays Harbor west of longitude 123°59'W.

Class A

(11) Grays Harbor east of longitude 123°59'W to longitude 123°45'45"W (Cosmopolis Chehalis River, river mile 3.1). Special condition - dissolved oxygen shall exceed 5.0 mg/L.

Class B

(12) Guemes Channel, Padilla, Samish and Bellingham Bays east of longitude 122°39'W and north of latitude 48°27'20"N.

Class A
Class AA

(13) Hood Canal.

(14) Mukilteo and all North Puget Sound west of longitude 122°39'W (Whidbey, Fidalgo, Guemes and Lummi islands and state highway 20 bridge at Deception Pass), except as otherwise noted.

Class AA

(15) Oakland Bay west of longitude 123°05'W (inner Shelton harbor).

Class B

(16) Port Angeles south and west of a line bearing 152° true from buoy "2" at the tip of Ediz Hook.

Class A

(17) Port Gamble south of latitude 47°51'20"N.

Class A

(18) Port Townsend west of a line between Point Hudson and Kala point.

Class A

(19) Possession Sound, south of latitude 47°57'N.

Class AA

(20) Possession Sound, Port Susan, Saratoga Passage, and Skagit Bay east of

Whidbey Island and state highway 20 bridge at Deception Pass between latitude 47°57'N (Mukilteo) and latitude 48°27'20"N (Similk Bay), except as otherwise noted.

Class A

(21) Puget Sound through Admiralty Inlet and South Puget Sound, south and west to longitude 122°52'30"W (Brisco Point) and longitude 122°51'W (northern tip of Hartstene Island).

Class AA

(22) Sequim Bay southward of entrance.

Class AA

(23) South Puget Sound west of longitude 122°52'30"W (Brisco Point) and longitude 122°51'W (northern tip of Hartstene Island, except as otherwise noted).

Class A

(24) Strait of Juan de Fuca.

Class AA

(25) Willapa Bay seaward of a line bearing 70° true through Mailboat Slough light (Willapa River, river mile 1.8).

Class A

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-085, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-085, filed 1/17/78.]

WAC 173-201-090 Achievement considerations. To fully achieve and maintain the foregoing water quality in the state of Washington, it is the intent of the department to apply the various implementation and enforcement authorities at its disposal, including participation in the programs of the Federal Clean Water Act (P.L. 95-217) as appropriate. It is also the intent that cognizance will be taken of the need for participation in cooperative programs with other state agencies and private groups with respect to the management of related problems. The department's planned program for water pollution control will be defined and revised annually in accordance with section 106 of said federal act. Further, it shall be required that all activities which discharge wastes into waters within the state, or otherwise adversely affect the quality of said waters, be in compliance with the waste treatment and discharge provisions of state or federal law.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-090, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-090, filed 1/17/78; Order 73-4, § 173-201-090, filed 7/6/73.]

WAC 173-201-100 Implementation. (1) Discharges from municipal, commercial, and industrial operations. The primary means to be used for controlling municipal, commercial, and industrial waste discharges shall be through the issuance of waste disposal permits, as provided for in RCW 90.48.160 and following.

(2) Miscellaneous waste discharge or water quality effect sources. The director shall, through the issuance of regulatory permits, directives, and orders, as are appropriate, control miscellaneous waste discharges and water quality effect sources not covered by WAC 173-201-100(1) hereof. It is noted that, from time to time, certain short-term activities which are deemed necessary to accommodate essential activities or to otherwise protect the public interest may be specially authorized by the director as indicated in WAC 173-201-035 (8)(e), under such conditions as the director may prescribe, even though such activities may result in a reduction of water quality conditions below those criteria and classifications established by this regulation.

[Statutory Authority: RCW 90.48.035, 78-02-043 (Order DE 77-32), § 173-201-100, filed 1/17/78; Order 73-4, § 173-201-100, filed 7/6/73.]

WAC 173-201-110 Surveillance. A continuing surveillance program, to ascertain whether the regulations, waste disposal permits, orders, and directives promulgated and/or issued by the department are being complied with, will be conducted by the department staff as follows:

(1) Inspecting treatment and control facilities.

(2) Monitoring and reporting waste discharge characteristics.

(3) Monitoring receiving water quality.

[Statutory Authority: RCW 90.48.035, 78-02-043 (Order DE 77-32), § 173-201-110, filed 1/17/78; Order 73-4, § 173-201-110, filed 7/6/73.]

WAC 173-201-120 Enforcement. To insure that the provisions of chapter 90.48 RCW, the standards for water quality promulgated herein, the terms of waste disposal permits, and other orders and directives of the department are fully complied with, the following enforcement tools will be relied upon by the department, in cooperation with the attorney general as it deems appropriate:

(1) Issuance of notices of violation and regulatory orders as provided for in RCW 90.48.120. Under this section, whenever in the opinion of the department a person is violating or about to violate chapter 90.48 RCW, the department shall notify said person of its determination. Within thirty days said person shall notify the department of the action taken or being taken in response to the department's determination, whereupon the department may issue a regulatory order as it deems appropriate. Whenever the department deems immediate action is necessary to accomplish the purposes of chapter 90.48 RCW, it may issue a regulatory order without first giving notice and thirty days for response.

(2) Initiation of actions requesting injunctive or other appropriate relief in the various courts of the state, as provided for in RCW 90.48.037.

(3) Levying of civil penalties as provided for in RCW 90.48.144. Under this section, the director may levy a civil penalty up to five thousand dollars per day against a person who violates the terms of a waste discharge permit, or who discharges without such a permit when the same is required, or violates the provisions of RCW 90.48.080. If the amount of the penalty, which is subject to mitigation or remission by the department, is not paid within thirty days after receipt of said notice, the attorney general, upon request of the director, shall bring an action in superior court to recover the same.

(4) Initiation of a criminal proceeding by the appropriate county prosecutor, as provided for in RCW 90.48.140.

(5) Issuance of regulatory orders or directives as provided for in RCW 90.48.240.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-120, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-120, filed 1/17/78; Order 73-4, § 173-201-120, filed 7/6/73.]